Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

TIMOTHY DANIELS AND F/V MISS JENNA, LLC,

Petitioners,

v.

FRANCIS PATENAUDE AND
THE NATIONAL MARINE FISHERIES SERVICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

EDWARD JAMES POWERS
Counsel of Record
VANDEVENTER BLACK LLP
500 World Trade Center
Norfolk, Virginia 23510
(757) 446-8600

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether a fishing vessel's intangible fishing privileges, granted by the Magnuson-Stevens Act, 16 U.S.C. §§ 1801, *et seq.*, are an appurtenance of the vessel and, therefore, subject to a maritime lien against the vessel.

PARTIES TO THE PROCEEDING

Petitioners:

Timothy Daniels and F/V Miss Jenna, LLC

Respondents:

Francis Patenaude

The National Marine Fisheries Service

Other Parties Below:

MacGregor's Marine Engineering, *Claimant*
F & B Enterprises, Inc., *Claimant*
Pier Oil Company, Inc., *Claimant*
Chris' Electronics, *Claimant*
Jon Rittgers, in his official capacity as Acting Regional Administrator of the National Marine Fisheries Service, *Defendant*
William M. Daley, in his official capacity as Secretary of Commerce, *Defendant*

RULE 29.6 LISTING

Miss Jenna, LLC is not a publicly held company and has no parent corporations or subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Timothy Daniels and Miss Jenna, LLC, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the First Circuit (App., *infra*, 1-2) is unreported. The decision of the United States District Court for the District of Massachusetts (App., *infra*, 3-5) is unreported.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on April 20, 2001 (App., *infra*, 1-2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

16 U.S.C. § 1853(d)(2)(A):

> No provision of law shall be construed to limit the authority of a Council to submit and the Secretary to approve the termination or limitation, without compensation to holders of any limited access system permits, of a fishery management plan, plan amendment, or regulation that provides for a limited access system, including an individual fishing quota program.

16 U.S.C. § 1853(d)(3):

> An individual fishing quota or other limited access system authorization –
>
> (A) shall be considered a permit for the purposes of sections 307, 308, and 309 [16 U.S.C. §§ 1857, 1858, and 1859];
>
> (B) may be revoked or limited at any time in accordance with this Act;
>
> (C) shall not confer any right of compensation to the holder of such individual fishing quota or other limited access system authorization if it is revoked or limited; and
>
> (D) shall not create, or be construed to create, any right, title, or interest in or to any fish before the fish is harvested.

STATEMENT OF THE CASE

This case involves the *in rem* arrest and subsequent sale of a fishing vessel to enforce a maritime lien. The U.S. District Court for the District of Massachusetts had original jurisdiction pursuant to 28 U.S.C. § 1333(1). The district court subsequently acquired jurisdiction pursuant to 28 U.S.C. § 1361.

A. Ownership of the Vessel

On August 11, 1998, the Petitioner, Miss Jenna, LLC (hereinafter "Miss Jenna"), by its chief operating officer, Timothy Daniels (hereinafter "Daniels"), purchased the F/V WEYMOUTH (USCG Official Number 241175). The

Bill of Sale was duly recorded with the U.S. Coast Guard on September 4, 1998. After the sale, the fishing vessel was renamed the F/V MISS JENNA (hereinafter "the Vessel") with a home port in Hampton, Virginia.

When it was purchased, the Vessel had no valid federal fisheries permits because the previous owner had been sanctioned by the National Marine Fisheries Service (hereinafter "NMFS"), pursuant to authority conferred by 16 U.S.C. § 1858(g). **(App., *infra* 33 ¶ 37)** NMFS agreed to lift the sanctions upon a transfer of the Vessel's title to Miss Jenna and, on September 24, 1998, a new NMFS permit was issued to Miss Jenna as owner of the Vessel. **(App., *infra* 33 ¶ 37)** Other than the aforementioned sanctions imposed by NMFS, there were no recorded maritime liens against the Vessel, or its fishing permits, when it was purchased by Miss Jenna on August 11, 1998.

B. Federal Fishery Conservation and Management

The primary regulatory statute for federal fishery conservation and management is the Magnuson-Stevens Act, 16 U.S.C. § 1801, *et seq.*, which gives the Secretary of Commerce the power to regulate U.S. fisheries. *See Conti v. United States*, 48 Fed. Cl. 532, 538 (2001). The administration of fishery conservation and management is organized into, and regulated by, five NMFS Regional Administrators, with offices located in Gloucester, Massachusetts; St. Petersburg, Florida; Seattle, Washington; Juneau, Alaska; and Long Beach, California. *See* 50 C.F.R. § 600.502, Table 1. This case involves a permit for the Fisheries of the Northeastern United States issued by the

NMFS regional office located in Gloucester, Massachusetts pursuant to 50 C.F.R. § 648. The permit is issued by NMFS on an annual basis and must be renewed at the expiration of each fishing year. *See* 50 C.F.R. § 648.4(a)(1)(i)(B). To be eligible for a fishing permit similar to the one at issue in this case, a vessel must (1) have been issued a permit for the preceding year; (2) be replacing a vessel that was issued a permit for the preceding year; or (3) be replacing a vessel that was issued a Confirmation of Permit History ("CPH"). *See* 50 C.F.R. § 648.4(a)(1)(i)(A).

A person who does not currently own a fishing vessel, but who has owned a qualifying vessel that has sunk, been destroyed or transferred to another person, can apply for and receive a CPH if the fishing and permit history has been retained lawfully by that person. *See* 50 C.F.R. § 648.4(a)(1)(i)(J). The CPH preserves the eligibility of the holder to apply for a limited access permit for a replacement vessel at a subsequent time. *Id.* In other words, a holder may retain the fishing history of a vessel which no longer exists for purposes of subsequently transferring it to another vessel which the holder owns.

Although the fishing and permit history *may* be transferred with the vessel when the vessel is sold, this is not required, and the seller may retain the fishing history. However, the fishing history and permit cannot be bought or sold independent of the vessel. *See* 50 C.F.R. §§ 648.4(a)(1)(i)(D), 648.4(k). Only one vessel may qualify, at any one time, for a permit based on that or another vessel's fishing and permit history, and the vessel must be documented under the laws of the United States and operated by a U.S. citizen. *See* 50 C.F.R. § 648.4(a)(1)(i)(C).

Furthermore, NMFS may revoke or suspend the permit pursuant to authority granted by 16 U.S.C. § 1858(g). *See* 50 C.F.R. § 600.740(c).

C. Proceedings Below

On November 17, 1998, the Respondent, Francis Patenaude (hereinafter "Patenaude"), filed an action against the Vessel, *in rem*, and a former owner of the Vessel, *in personam*, to enforce a maritime lien which arose in December of 1996. Patenaude's Verified Complaint, filed pursuant to Rule C(2) of the Supplemental Rules for Certain Admiralty and Maritime Claims (hereinafter "the Supplemental Admiralty Rules"), did not describe, identify, or reference the Vessel's fishing permits or associated fishing privileges.

On November 27, 1998, the Vessel was seized in New Bedford, Massachusetts, by the United States Marshal pursuant to a Rule C(3) *in rem* action. Like the Verified Complaint, the *in rem* Warrant of Arrest issued by the district court did not describe, identify or reference the Vessel's fishing permits or associated fishing privileges as subject to the arrest. On December 11, 1998, Daniels filed a Claim and Answer on behalf of Miss Jenna, pursuant to Rule C(6) of the Supplemental Admiralty Rules.

On December 8, 1998, while the Vessel was still in the custody of the U.S. Marshal, Daniels submitted an application to NMFS' regional office in Gloucester, pursuant to 50 C.F.R. § 648.4(a)(1)(i)(E), for the replacement of the Vessel with another fishing vessel, the F/V TOP FLIGHT,

and the associated transfer of fishing histories and limited access permit eligibility (hereinafter "fishing history"). **(App., *infra* 30 ¶ 21)** On December 24, 1998, NMFS approved Daniels' application and authorized the transfer of the fishing history from the Vessel to the F/V TOP FLIGHT. **(App., *infra* 31 ¶ 24)**

On March 1, 1999, Patenaude purchased the Vessel at a Rule E(9) judicial sale on an "as is, where is" basis, without any warranty or representation that the fishing permits or associated fishing history were included in the sale. **(App., *infra* 32 ¶ 31)** Neither the district court's Order for Interlocutory Sale, nor the court ordered valuation survey of February 12, 1999, described, identified or referenced the Vessel's fishing permits or associated fishing history. Prior to the sale, Patenaude never inquired of NMFS as to the Vessel's permit status. **(App., *infra* 32 ¶ 31)** After he purchased the Vessel and applied to NMFS for new permits, Patenaude was notified that the Vessel had no valid fishing permits or associated fishing history because they had been transferred two months earlier, on December 24, 1998, to the F/V TOP FLIGHT. **(App., *infra* 32 ¶ 33)**

On June 2, 1999, Patenaude filed a Motion for Preliminary Injunction and Amended Verified Complaint against Miss Jenna, Daniels, and NMFS, seeking to invalidate the December 24, 1998 transfer of the fishing history from the Vessel to the F/V TOP FLIGHT. Patenaude argued that the Vessel's fishing history constituted an appurtenance to the Vessel subject to his maritime lien and, therefore, the fishing history could not be transferred while the Vessel was under arrest. Miss Jenna and

Daniels argued, on the other hand, that the fishing history was an abstract privilege granted by the federal government and, therefore, did not constitute an appurtenance to the Vessel subject to Patenaude's maritime lien. As such, the fishing history was not subject to the Vessel's arrest, and the transfer of the fishing history by NMFS was entirely proper.

On July 6, 1999, the district court granted the preliminary injunction and ordered NMFS to invalidate the transfer of December 24, 1998, so as to restore the fishing history to the Vessel pending resolution of the case. **(App., *infra* 37-40)**. The parties agreed to file factual stipulations and exhibits, in lieu of a trial, for the district court's consideration in rendering a final judgment on the issue of whether the fishing history is an appurtenance of the Vessel subject to Patenaude's maritime lien. **(App., *infra* 27-36)** The district court heard oral argument on October 25, 2000, and issued its final judgment on October 31, 2000.

In its judgment, the district court held that the fishing history was an appurtenance to the Vessel which transferred to Patenaude upon the judicial sale of the Vessel on March 1, 1999. **(App., *infra* 4 ¶ 3)** The district court issued no written Opinion or Order. Rather, the district court stated during the hearing of October 25, 2000, that it was basing its decision on the then recently published district court opinion in *Gowen, Inc. v. F/V QUALITY ONE*, 2000 AMC 2225 (D. Me. 2000). **(App., *infra* 7-9, 24)** On November 22, 2000, Daniels and Miss Jenna appealed the district court's judgment to the U.S. Court of Appeals for the First Circuit.

On March 30, 2001, while Daniels' and Miss Jenna's appeal was pending, the court of appeals issued its opinion in *Gowen, Inc. v. F/V QUALITY ONE*, 244 F.3d 64 (1st Cir. 2001).[1] *Gowen* held that a vessel's fishing permits are an appurtenance of the vessel and, therefore, subject to a maritime lien against the vessel. *Gowen* at 68-69. After the court of appeals issued its *Gowen* decision, Patenaude moved for summary affirmance of the district court's decision in this case on the ground that *Gowen* was controlling precedent on the issue raised in Daniels' and Miss Jenna's appeal. On April 20, 2001, the court of appeals granted Patenaude's motion for summary affirmance, explaining that its recent *Gowen* decision was controlling as to the issue of whether the Vessel's fishing history was an appurtenance subject to a maritime lien against the Vessel. **(App., *infra* 2)**

REASONS FOR GRANTING THE WRIT

I. The decision of the court of appeals involves an important federal question of first impression which has not been, but should be, settled by this Court

As the court of appeals acknowledged, "the issue is both novel and difficult." *Gowen*, 244 F.3d at 71. This case presents an important issue of first impression regarding the extension of maritime liens to intangible fishing

[1] A Petition for Writ of Certiorari in the case of *Gowen, Inc. v. F/V QUALITY ONE*, 244 F.3d 64 (1st Cir. 2001), was filed on June 28, 2001, and is presently pending before this Honorable Court.

privileges granted by Congress. The decision of the court of appeals violates the doctrine that maritime liens are *stricti juris* and should not be extended by construction, analogy, or inference. *See Racal Survey USA, Inc. v. M/V CONT FLEET*, 231 F.3d 183 (5th Cir. 2000), citing *Piedmont & George's Creek Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 12 (1920).

Because a maritime lien attaches to *property*, it logically follows that federal fishing privileges must be property in order for a maritime lien to attach. The court of appeals accepted this proposition and effectively created a property right where none existed before, since Congress made clear that it did not intend to create a property right in the permit and associated fishing privileges in this case. *See* 16 U.S.C. § 1853(d)(2) & (3); *Conti v. United States*, 48 Fed. Cl. 532, 538 (2001) (federal fisheries permits do not create a property interest); *see also, e.g., United States v. Fuller*, 409 U.S. 488, 494 (1973) ("The provisions of the Taylor Grazing Act . . . make clear the congressional intent that no compensable property right be created . . . "). NMFS, the federal agency tasked with administering fisheries regulation, does not treat the permit in this case as property. On the contrary, NMFS does not allow the permit itself to pass to a new owner of the vessel, and the associated fishing privileges cannot be transferred independent of the vessel. *See* 50 C.F.R. § 648.4(k). Similarly, NMFS retains the authority to suspend or revoke the permit and its associated fishing privileges. *See* 16 U.S.C. § 1858(g); 50 C.F.R. § 600.740(c).

The decision of the court of appeals casts doubt over the validity of these regulations, and threatens the

orderly administration of federal fisheries legislation by NMFS. Because the court of appeals created new law which is inconsistent with the legislative intent of the Magnuson-Stevens Act, as well as NMFS's construction and administration of the Act, this Court should grant certiorari to review the issue. *See American Federation of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964) (an issue of first impression under a federal statute is a proper basis for granting certiorari); *Morton v. Ruiz*, 415 U.S. 199, 201-02 (1974) (appropriate to grant certiorari when the lower court's decision asserted to be "inconsistent with long-established policy of Secretary [of Interior]."); *Patterson v. Lamb*, 329 U.S. 539 (1947) (decision below upset 25 years of War Department rulings and practices).

II. The decision of the court of appeals involves an important question regarding the applicability of the Supplemental Rules for Certain Admiralty and Maritime Claims to *In rem* and *Quasi in Rem* actions against a vessel or its intangible fishing privileges

The decision of the court of appeals opens a Pandora's Box with regard to the application of the Supplemental Admiralty Rules to *in rem* and *quasi in rem* actions against fishing vessels or their associated fishing privileges. Although federal fishing privileges are intangible in nature, the recent extension of maritime lien law by the court of appeals does not require that the provisions of Rule E(4)(c) be followed. Instead, by defining intangible fishing privileges as an appurtenance of a vessel, the court of appeals would allow a litigant to arrest or attach

intangible property by simply arresting or attaching a vessel pursuant to Rule E(4)(b).

Conversely, the court of appeals' expansive interpretation of maritime liens would appear to allow a litigant to effectively "tie up" a fishing vessel by attaching or arresting only its intangible fishing privileges pursuant to Rule E(4)(c). As such, a creditor, who otherwise would not be able to arrest a vessel because it cannot be found within the district or otherwise, could circumvent the requirements of Rule C(2) and Rule E(4)(b) by simply arresting or attaching the vessel's federal fishing privileges, effectively rendering the vessel legally inoperable. Such strong arm tactics could wreak havoc with the fishing industry, as well as the administration of the federal court system.

Assuming the viability of such an action, it is uncertain how the court will sell the fishing privileges pursuant to Rule E(9) of the Supplemental Admiralty Rules. Unlike tangible property, or intangible property such as freights which can be tendered into the court's registry and distributed among creditors, abstract fishing privileges cannot be sold independently because federal regulations do not allow it. *See* 50 C.F.R. § 648.4(k).

It is equally unclear which federal district court would have jurisdiction over such intangible property. Presumably, the district wherein the relevant NMFS regional office is located would be the appropriate forum for such actions, since that is where process would arguably be served under Rule E(4)(c). This, in turn, presents some compelling due process arguments regarding the

constitutionality of requiring a vessel owner to respond to a federal court action in a distant forum where he has no minimum contacts, except that the NMFS regional office which issued the fishing permits happens to be located there. Such a scenario would also present some difficult jurisdictional issues if the vessel lies in one federal district while the "fishing history" lies in another.

Even more troublesome is the inevitable result that creditors of a vessel will seek to assert their maritime liens against permits and their associated fishing privileges which have been lawfully transferred to another vessel. For instance, because a maritime lien attaches to the vessel and its appurtenances, the destruction or loss of the vessel extinguishes any maritime liens thereon. *See Walsh v. Tadlock*, 104 F.2d 131 (9th Cir. 1939); *Maritrend, Inc. v. M/V SEBES*, 1997 WL 660614 (E.D. La. 1997); *Central Soya Co., Inc. v. Cox Towing Corp.*, 417 F. Supp. 658, 664 (N.D. Miss. 1976); *Fathom Expeditions, Inc. v. M/T GAVRION*, 402 F. Supp. 390, 396 (M.D. Fla. 1975). As one federal court has explained,

> When [the vessel] sank and disappeared, it carried its creditors' maritime liens with it to the ocean floor. The destruction of the vessel extinguishes the maritime liens against it.

Maritrend, Inc. v. M/V SEBES, 1997 WL 660614 (E.D. La. 1997) (citations omitted); *see West of England Ship Owners v. Patriarch S.S. Co.*, 491 F. Supp. 539, 542 (D. Mass. 1980) (because the loss or destruction of the vessel and its appurtenances results in a destruction of the *res*, so too is lost the opportunity to proceed *in rem* to recover a debt owing). However, a maritime lien may hold on any part of the vessel which remains or can be reached after the

vessel is lost. *See Walsh v. Tadlock*, 104 F.2d 131 (9th Cir. 1939); *Rothman v. S/S PRES. TAFT*, 1995 AMC 1250, 1258 (N.D. Cal. 1994).

Because the owner of a sunken fishing vessel retains the vessel's fishing history pursuant to 50 C.F.R. § 648.4(a)(1)(i)(J), any maritime liens on the vessel would presumably remain attached to the surviving fishing history if it is legally defined as an appurtenance. If the fishing history is transferred to a replacement vessel, it stands to reason that the maritime lien on the fishing history would follow to the replacement vessel, thereby giving the creditor a right to proceed *in rem* against the new vessel, despite having no lien against the vessel itself. Counsel of Record for Petitioners has been informed of at least one recent case in the U.S. District Court for the District of New Jersey in which this exact scenario is presently unfolding in light of the *Gowen* decision.

The decision of the court of appeals also impacts the application of Supplemental Admiralty Rule F actions wherein a vessel owner seeks to limit liability to the value of the vessel. Normally, a vessel which is lost at sea results in the vessel owner having no interest. *See Place v. Norwich & New York Transportation Co.*, 118 U.S. 468, 491-93 (1886); *The Scotland*, 118 U.S. 507 (1886); *The Great Western*, 118 U.S. 520 (1886); *see also Complaint of Caribbean Sea Transport, Ltd.*, 748 F.2d 622, 626 (11th Cir. 1984) ("it is undisputed that the vessel is lying at the bottom of the sea and has no value whatsoever."). However, if the owner's interest in the vessel includes the permits and associated fishing privileges which survive the loss of the vessel, the amount of security required by

Rule F(1) is immediately called into question. Such a case begs the ultimate question of whether one can have an ownership interest in federal fishing privileges to begin with.

The decision of the court of appeals may also serve as precedent that other federally conferred rights or privileges are subject to maritime liens. Whether the rights are granted pursuant to a NMFS fishing permit, a USCG Certificate of Documentation or any other federally issued document, the resulting confusion and uncertainty regarding the applicability of the Supplemental Admiralty Rules could be unprecedented. This Court should grant certiorari in order to address this important issue and bring much needed certainty and uniformity to the application of the Supplemental Admiralty Rules.

III. The decision of the court of appeals undermines this Court's policy of promoting uniformity within the law of admiralty

This Court has consistently emphasized the need for uniformity of maritime law. *See generally United States v. Locke*, 529 U.S. 89 (2000) (objective of federal law is uniformity of regulation for maritime commerce); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 677 (1982) (modern justification of federal courts is the important national interest in uniformity of law and remedies for those facing the hazards of waterborne transportation); *Moragne v. States Marine Lines*, 398 U.S. 375, 402 (1970) ("such uniformity . . . will give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the

whole country.' "). The decision of the court of appeals is inconsistent with principles of uniformity.

In rendering its decision, the court of appeals relied upon the theory that a fishing permit adds value to the vessel, and therefore increases its creditworthiness. *See Gowen*, 244 F.3d at 68. However, the court of appeals ignored the fact that fishing permits are issued on a regional basis and are species specific. As such, a fishing permit that may be valuable and necessary for the operation of a fishing vessel in Cape Cod Bay, may be worthless and unnecessary to a fishing vessel operating in the Gulf of Mexico. In sum, the court of appeals' definition of an appurtenance is contingent upon the geographical region where the vessel is operating, or the species of fish being harvested. Further still, what may be an appurtenance to a U.S. vessel will not be an appurtenance to a foreign vessel. Such a rule of law is entirely inconsistent with the policy of uniformity, and this Court should grant certiorari in order to address this important issue.

IV. The decision of the court of appeals in this case is erroneous

The court of appeals erred by holding that intangible fishing privileges are an appurtenance of the vessel subject to a maritime lien. In contract cases, the maritime lien is based upon the policy which looks to the ship itself, as security for the supplies and repairs the vessel must of necessity obtain on its own account. *See U.S. v. The Malek Adhel*, 43 U.S. (2 How.) 210, 11 L.Ed. 239 (1844). As this Court explained in *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 9 (1920):

> The maritime lien developed as a necessary incident of the operation of vessels. The ship's function is to move from place to place. She is peculiarly subject to vicissitudes which would compel abandonment of vessel or voyage, unless repairs and supplies were promptly furnished. Since she is usually absent from the home port, remote from the residence of her owners, and without any large amount of money, it is essential that she should be self-reliant, – that she should be able to obtain upon her own account needed repairs and supplies.

Implicit in this principle is the understanding that a maritime lien attaches not only to the vessel's hull, but also to its appurtenances. The court of appeals correctly recognized that an appurtenance is tangible *equipment* installed aboard a vessel, which becomes an integral part of the vessel and is essential to its navigation and operation. *See Gowen*, 244 F.3d at 67, citing *United States v. F/V SYLVESTER F. WHALEN*, 217 F. Supp. 916, 917 (D. Me. 1963); *see also* 2 *Benedict on Admiralty* § 32 (7th Rev. Ed.). This principle is based upon the rationale that if potential creditors boarding a vessel to appraise its value could not rely upon the appearance of the entire vessel, including its appurtenances, then they would be reluctant to extend credit. *See* 2 Benedict on Admiralty § 32 (7th Rev. Ed.); *see also* W. Tetley, *Maritime Liens and Claims*, 13-17 (2nd Ed. 1998); *see also* Thomas J. Schoenbaum, *Admiralty and Maritime Law*, § 9-1, at 481-82 (2nd Ed. 1994).

In over two centuries of admiralty jurisprudence, federal courts have consistently defined appurtenances as tangible property which is readily apparent and visible to suppliers and materialmen relying upon the credit of a

vessel. This historical perspective of appurtenances cannot be harmonized with the concept of intangible and abstract rights or privileges. Perhaps because such intangible rights are not visible or readily discernible to potential creditors inspecting the vessel, they are too easily the subject of a fraud or mistake regarding their existence or validity.[2] Additionally, a vessel owner's ability to freely pledge or sell the vessel or its appurtenances should not be dependent upon the citizenship of the creditor or buyer. This is crucial to a vessel in need of supplies or repairs while in a foreign port. However, this is not the case with Federal fishing privileges issued only to U.S. vessels and their owners.

The court of appeals erred in expanding the definition of appurtenances to include intangibles. Although intangible rights or privileges may be important to the vessel's use or operation, they do not constitute appurtenances which become subject to a maritime lien on the vessel. By way of illustration, the intangible rights conferred by a policy of marine insurance, although essential to the operation of a fishing vessel,[3] do not become an appurtenance subject to a maritime lien against the vessel. *See Walsh v. Tadlock*, 104 F.2d 131, 132 (9th Cir. 1939) (with the destruction of the vessel the maritime liens thereon were of necessity extinguished, and the liens did

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[2] Such problems may be illustrated by Patenaude's own lack of due diligence in failing to inquire of NMFS whether the Vessel was being sold with permits and associated fishing privileges.

[3] *See West One Bank v. CONTINUITY*, 1994 AMC 2059 (W.D. Wash. 1994); *The Flagship Group Ltd. v. Peninsula Cruise, Inc.*, 771 F.Supp. 756 (E.D. Va. 1991).

not attach to the proceeds of the insurance). The court of appeals' reliance on Justice Holmes' opinion in *United States v. Freights of the Mount Shasta*, 274 U.S. 466 (1927), is misplaced, as that case simply recognized the right to assert a maritime lien on subfreights due a vessel owner. The *Mount Shasta* Court did not define the subfreights as an appurtenance subject to a lien against the vessel. The court of appeals failed to take the aforementioned principles into consideration, and this Court should grant the Petition to correct the erroneous holding of the court of appeals.

CONCLUSION

For the reasons set forth herein, Petitioners, Timothy Daniels and Miss Jenna, LLC, respectfully request that this Honorable Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

EDWARD JAMES POWERS
Counsel of Record
VANDEVENTER BLACK LLP
500 World Trade Center
Norfolk, Virginia 23510
(757) 446-8600

App. 1

United States Court of Appeals
For the First Circuit

No. 00-2561

FRANCIS PATENAUDE,

Plaintiff, Appellee,

v.

FV MISS JENNA, O.N. 241175, HER ENGINES, TACKLE, APPAREL, FURNITURE, EQUIPMENT, AND CATCH, F/K/A FV WEYMOUTH; TIMOTHY DANIELS; FV MISS JENNA, LLC,

Defendants, Appellants.

JON RITTGERS, IN HIS OFFICIAL CAPACITY AS ACTING REGIONAL ADMINISTRATOR OF THE NATIONAL MARINE FISHERIES SERVICE; WILLIAM M. DALEY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF COMMERCE,

Defendants.

NATIONAL MARINE FISHERIES SERVICE,

Defendant, Appellee.

MACGROGOR'S MARINE ENGINEERING; F&B ENTERPRISES, INC.; PIER OIL COMPANY, INC.; CHRIS' ELECTRONICS,

Claimants.

Before
Torruella, *Chief Judge*,
Campbell, *Senior Circuit Judge*,
and Stahl, *Circuit Judge*.

JUDGMENT

Entered: April 20, 2001

Appellee, Francis Patenaude, moves for summary affirmance on the ground that this court's recent decision in *Gowen, Inc. v. F/V Quality One*, ___ F.3d ___, 2001 WL 293208 (1st Cir. Mar. 30, 2001), is controlling as to the sole issue presented by the instant appeal. Appellants concede that *Gowen* is controlling precedent.

We, therefore, grant appellee's motion and the decision of the district court, dated October 31, 2000 and entered on November 2, 2000, is, hereby, summarily *affirmed*. *See* Loc. R. 27(c).

By the Court:

Phoebe Morse

Clerk.

cc:

Bertram E. Snyder, Esq.
Edward J. Powers, Esq.
Thomas E. Clinton, Esq.
Robert Edward Collins, Esq.
Barbara Healy Smith, Esq.
Andrew B. Saunders, Esq.
Pamela F. Lafreniere, Esq.

Certified Copies:

Mr. Anthony Anastas, U.S.D.C. Clerk
Honorable Douglas P. Woodlock

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FRANCIS PATENAUDE, Plaintiff;	)	
PEER OIL, INC., F&B ENTERPRISES, INC., and MacGREGOR'S MARINE ENGINEERING, Claimants;	)	
v.	)	CIVIL ACTION
FV MISS JENNA, O.N. 241175 (Formerly FV WEYMOUTH,) her engines, gear, tackle, apparel furniture, equipment, and catch *IN REM* Defendant;	)	NO. 98-12351-DPW
and WEYMOUTH FISHING CORP., and IVAN KINSLOW, *IN PERSONAM*, Defendants;	)	
and	)	
NATIONAL MARINE FISHERIES SERVICE, PERMIT DIVISION; JON RITTGERS, In his official capacity as Acting Regional Administrator of the National Marine Fisheries Service; WILLIAM M. DALEY, In his official capacity as Secretary of Commerce; TIMOTHY DANIELS; and FV MISS JENNA, LLC, *Declaratory and Injunctive Relief*, Defendants.	)	

JUDGMENT

WOODLOCK, District Judge

Upon the entire record in this proceeding, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. That the Plaintiff, Francis Patenaude, has established a claim of $31,070.99, including prejudgment interest, *in rem* against defendant the FV Miss Jenna, O.N. 241175 (formerly the FV Weymouth), and her appurtenances.[1]

2. That the sale of the FV Miss Jenna to the Plaintiff Francis Patenaude, for $52,000.00 to satisfy claims against her, is confirmed.

3. That the appurtenances of the FV Miss Jenna transferred in the sale referenced in paragraph 2, *supra*, included her fishing history and associated fishing permit, subject to generally applicable regulatory provisions.

4. That *custodia legis* expenses related to the seizure and sale of the FV Miss Jenna are established as $31,191.54.

5. That the Plaintiff Francis Patenaude has paid into the Court $25,000 in cash and the Court has recognized $27,000 in credit against the judgment finally rendered in paragraph 1, *supra*, in satisfaction of his purchase obligation arising out of the judicial sale of the FV Miss Jenna.

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[1] A notice of voluntary dismissal as to *in personam* defendants Weymouth Fishing Corp. and Ivan Kinslow was filed by plaintiff on December 29, 1998.

6. That, of the $25,000 in cash placed in the registry of the Court, there remains after partial payment of certain *custodia legis* expenses, the sum of $9,126.00.

7. That the Plaintiff Francis Patenaude has paid additional *custodia legis* expenses arising out of the seizure and sale of the FV Miss Jenna in the amount of $14,194.87.

8. That the maritime lien claims of others established on this record – Pier Oil Company, Inc. in an amount of not less than $8,202.85; F&B Enterprises, Inc. in an amount of not less than $892.33; and MacGregor Engineering in an amount not less than $774.75 – are subordinate to the claims of the Plaintiff Francis Patenaude.

9. That the $9,126.00 in funds related to this action which are in the registry of this Court, shall be returned to the Plaintiff Francis Patenaude in satisfaction of the remainder of the final judgment reflected in paragraph 1, *supra*, with the excess applied to the unreimbursed *custodia legis* expenses incurred by Plaintiff Francis Patenaude reflected in paragraph 7, *supra*.

10. That the prior rights and interests of any and all persons, firms, or corporations in the FV Miss Jenna, are forever foreclosed except as reflected in this Judgment.

BY THE COURT,

/s/ Rebecca Greenbey
Deputy Clerk

DATED: OCTOBER 31, 2000

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

FRANCIS PATENAUDE Plaintiff VERSUS FV MISS JENNA, O.N. 241175 FKA WEYMOUTH, WEYMOUTH FISHING CORPORATION, IVAN KINSLOW, NATIONAL MARINE FISHERIES SERVICE, JOHN RITTGERS, WILLIAM M. DALEY, TIMOTHY DANIELS, MACGREGOR'S MARINE, F&B ENTERPRISES, INC. PIER OIL COMPANY, INC. AND CHRIS' ELECTRONICS Defendants	*	CA-98-12351-DPW

BEFORE THE HONORABLE
DOUGLAS P. WOODLOCK

UNITED STATES DISTRICT COURT JUDGE

HEARING ON MOTION FOR
PRELIMINARY INJUNCTION

OCTOBER 25, 2000

APPEARANCES:

BERTRAM E. SNYDER, ESQ., Looney & Grossman, 101 Arch Street, 9th Floor Boston, Massachusetts 02110, on behalf of the Plaintiff

EDWARD J. POWERS, ESQ., Vandeventer, Black, LLP, 500 World Trade Center, Norfolk, Virginia 23510-1699, on behalf of Timothy Daniels and MISS JENNA LLC, Defendants

BARBARA HEALY SMITH, ESQ., Assistant U.S. Attorney, U.S. Department of Justice, U.S Attorney's Office, 1 Courthouse Way, Suite 9200, Boston, Massachusetts 02210, on behalf of the National Marine Fisheries Service, Defendant

[2] ANDREW B. SAUNDERS, ESQ., Saunders & Saunders, P.C. 150 Eighth Street, 2nd Floor, New Bedford, Massachusetts 02470, on behalf of defendants

GENE S. MARTIN, JR., ESQ., U.S. Department of Commerce, National Oceanic & Atmospheric Administration, Office of General Counsel, Northeast, 1 Blackburn Drive, Gloucester, Massachusetts 01930, on behalf of defendants

Courtroom No. 1 – 3rd Floor
1 Courthouse Way
Boston, Massachusetts 02210
3:45 P.M. – 4:45 P.M.

Pamela R. Owens – Official Court Reporter
1 Courthouse Way – Suite 3200
Boston, Massachusetts 02210

Method of Reporting: Computer-Aided Transcription

CA-98-12351-DPW

[3] OCTOBER 25, 2000

THE COURT: Well, let me just start with a fundamental question here. And that is assuming – as you should – that I find Judge Carter's decision in *Gowan*

persuasive and compelling, is there anything really left for Mr. Daniels.

MR. POWERS: May it please the Court, Your Honor, no.

THE COURT: Why shouldn't I?

MR. POWERS: I'm sorry, Your Honor?

THE COURT: Why shouldn't I find it compelling?

MR. POWERS: Because with all due respect to Judge Carter, he was wrong.

THE COURT: Why?

MR. POWERS: I don't believe that it is –

THE COURT: If it came from a Judge, that would be called an ipse dixit. For the lawyers, it's the beginning of an argument.

MR. POWERS: Your Honor, I clerked for Judge Kellam before he died. And he always said that he was never wrong. And, so, I understand where Judge Carter is coming from. And to the extent this Court –

THE COURT: Around here, the view is that the District Judges are frequently in error, but rarely in [4] doubt. The question of right or wrong doesn't enter into it.

MR. POWERS: Your Honor, if this Court is going to find the *Gowan* decision of binding precedence, then –

THE COURT: It's not binding, but it seems to me to be quite compelling in dealing with these issues. And I wish I said it first, but he seems to be right.

MR. POWERS: Your Honor, I believe – obviously, I respectfully disagree with your decision. But by the same token, I think that that decision as well as this decision is going to – well, it obviously presents the Court with a Pandora's box, which I don't think need be opened or should be opened.

THE COURT: How so? Assume that I accept the the [sic] Government's qualifications that to some degree are narrowly contained by the nature of the fishing permit, why isn't it useful to think that that is an appurtenance here? I mean, there is very little that serves the purpose of a fishing vessel more than the right to fish.

MR. POWERS: True, Your Honor. A vessel can't fish without its captain. That doesn't make the captain an appurtenance.

THE COURT: Right. But the 13th Amendment has [5] something to say about that.

MR. POWERS: Obviously, Your Honor. But if I could use as a very simple analogy a vessel just like the MISS JENNA, the CAROLINE BREEZE sunk, scallop boat, wood hole, had a permit just like the MISS JENNA's. It sunk on October 7th this year 30 miles off the coast of Virginia. I represent the owner. And the decision of this Court will very likely have far-reaching ramifications beyond who owns the permit to the MISS JENNA. In that case, as Your Honor knows, the vessel has sunk. It's is [sic] in a hundred feet of water on the high seas, 30

miles offshore. The owner of that vessel retains the fishing history pursuant to the National Marine Fisheries Service regulations. If, as the plaintiff suggests, the maritime lien attaches to the fishing history, then it would seem to me that every creditor who is now aware that the vessel has sunk and they can no longer assert their lien again [sic] the vessel is going to seek to assert their lien against the fishing history. And dispute the somewhat –

THE COURT: Well, be more specific. Are you talking about a limitation action?

MR. POWERS: No, Your Honor. I'm talking simply if I'm a creditor and I am aware that my client or – I'm sorry. I'm a creditor and I have a lien on a [6] vessel. I provided some service, either bunkers or ice or repairs, and I have a lien on that vessel and that vessel sinks. As Your Honor knows, on traditional principles of admiralty, I lose my lien once the res is gone. When the ship goes down, so goes down my lien. Your Honor is also well aware of the principle that to the extent an appurtenance or equipment survives the sinking of the vessel, then the maritime lien can attach to that appurtenance.

What we have here would be a situation where the maritime lien is on the vessel. The vessel sinks. It is a loss. The owner retains the fishing history. The creditors now are going to seek to assert their maritime lien on that fishing history. There is very simple – when I say Pandora's box, right off the bat, you're going to have seizure actions, either Rule (c) arrests or Rule (b) attachments being filed against that fishing history. Now, the National Marine Fisheries Service is going to have to respond to everyone of those seizure actions. There is always an

issue of whether or not – as Your Honor knows, if the vessel is 30 miles off the coast of Virginia, it is not within the territorial waters of the District Court of Virginia or any other district court for that matter. But, based on what I assume is happening in this action, just as the [7] permit in this action was technically on a vessel in Norfolk, Virginia, and this Court asserted jurisdiction over the res being the fishing history, I'm assuming, based on what the Court did here, that the res or the property is located in Gloucester at the National Marine Fisheries Service regional office. So you're going to have a situation where everybody is going to be filing these seizure actions on the District of Massachusetts, all up and down the Eastern Seaboard. You have a situation where –

THE COURT: I mean, apart from – I don't speak on behalf of my colleagues, I assure you. But what's wrong with that? So, there is a place where – assuming that that happens, assuming that there is an after-market in these fishing licenses, which I don't assume, they're governed to a considerable degree by how the National Marine Fisheries deals with potential new recipients of it.

MR. POWERS: I agree with Your Honor. And one of the issues that will obviously have to be dealt with is what happens when you have this fishing history with no vessel. You have it – I guess you – I'm not sure what the National Marine Fisheries Services does with it. I'm not sure whether you produce the fishing history into the court. They obviously can't post the [8] value of the fishing history. That wouldn't be fair for National Marine Fisheries Service to pony up the money, unlike freights or intangibles that are in a bank account where you can tender over the funds. You are then going to have –

THE COURT: But if it has value –

MR. POWERS: I'm sorry?

THE COURT: If it has value, why not?

MR. POWERS: Well, but, Your Honor, it has value depending on where you're fishing. It has no value to somebody in the Gulf of Mexico.

THE COURT: Right.

MR. POWERS: It has no value to a foreign owner who has no intention of fishing in U.S. waters. And if we are ever going to grasp or adhere to the basic premise of uniformity in maritime law, it would seem that an appurtenance should be an appurtenance, whether it's in New England or whether it's in the Gulf of Mexico. It shouldn't matter on whether or not I happen to be a Canadian, for instance. Suppose I own a fishing boat and I happen to be up around Nova Scotia and I call in and I need fuel or ice or what-have-you. If I am that Canadian supplier, under traditional doctrines of maritime lien law, it shouldn't matter that I happen to be a Canadian. I can assert my lien against your [9] vessel.

But in this case, if the vessel sinks and I want to protect my interests against that fishing history and the fishing history is auctioned off, as the plaintiff suggests, first of all, I'm not sure a fishing history under the present regulations can be auctioned off. The National Marine Fisheries Service requires that they can be transferred with the vessel. They can't be bought and sold independently.

THE COURT: All right. So, somebody discounts the value. I mean, all of this is an argument about what

value people are going to attach to a particular appurtenance. I assume that if someone is doing a lot of fishing in Artic [sic] waters, an air conditioner isn't particularly valuable. That doesn't mean that it's not an appurtenance.

So, the real question is what's the problem with treating something like a fishing history as having a value that's recognized in the current regulatory climate. It may be constrained – substantially constrained – for a variety of different reasons, some of which you have identified.

MR. POWERS: And how do I protect my interest if I'm a foreign creditor?

THE COURT: You do the best you can. Here is [10] a potentially available asset to provide you with some degree of security.

MR. POWERS: But the security, Your Honor, would be the vessel. I'm extending credit to the vessel. And the argument that the vessel is absolutely worthless and has no value without a fishing permit is nonsense. The owner that I was just talking about of the CAROLINA BREEZE whose vessel sunk three weeks ago has a fishing permit history. He doesn't have a vessel. Now he's looking – he doesn't have another vessel to assign it to. So he's looking to buy a vessel without the permits. Now, based on plaintiff's argument, he should be able to walk out and virtually have it for free because people are giving away these vessels because they have no valve.

THE COURT: Well, no. It depends on the vessel itself. I have to say that the MISS JENNA was not shipshape. They looked at it and said, "This is not worth much, except as it can be used for fishing. Someone who is familiar with the industry can assign a value to it on that basis. Maybe it had a scrap value. Maybe it didn't. I don't really know. But I guess I don't understand what the real problem is, except that there has to be further tailoring in this area. In this particular context, there was a value established in the [11] record for this fishing permit. And it strikes me that treating it as an appurtenance is probably a good thing for the system of maritime liens. It's not a bad thing. Creditors can decide whether or not they want to extend credit on the basis – you know, a Canadian ice company can make its the [sic] own judgment about whether it's going to extend credit on the basis of the existence of a fishing license or permit or history.

MR. POWERS: I agree, Your Honor. And to the extent that the Canadian supplier wants to protect that interest, he has no way of doing so. If that fishing history is put up for auction because the boat has sunk and the National Marine Fisheries Service tenders it over to the court and there's an auction, he can't bid on it. He's not a U.S. citizen. He can't protect the very interest that he has for security.

THE COURT: That's his – you know, those are kinds of choices he makes all the time. And he's probably better off under those circumstances. At least he's got a hold over someone who is absolutely proscribed from treating that as an appurtenance. But those are very interesting cases for someone else.

The real issue for me is what kinds of problems should lead me to be concerned about this. And I really don't see any. We're dealing with a regulatory [12] regime, where there are a variety of constraints upon those who fish, that they have created what we sometimes talk about as new property, what the government has. And the Court will be blinking reality not to recognize the existence of that new property.

MR. POWERS: Well, Your Honor, I don't think it is new property. I think it's a privilege bestowed by the United States Government – in this case, National Marine Fisheries Service had the ability and the power to revoke or suspend the fishing license.

THE COURT: According to due process standards.

MR. POWERS: And if I'm truly a lien holder, how do I protect – if I had an interest in that new property, and that new property is now revoked or suspended, I have no control over that. I can't protect my interest if it's truly the security I'm looking for.

THE COURT: Well, but that suggests that all security has to be complete security. And, of course, that's not the case. As I say, you do the best you can. Here is another arrow for your quiver. It may not be the straightest arrow. It may even collapse when it's shot in the air, but it beats nothing.

MR. POWERS: And if I'm a lien holder, I have no way to record that lien. There's no method by which [13] I can record the notice of lien for a fishing history. Normally, I'd record it with the Coast Guard. I'd file my

Notice of Lien with the Coast Guard and it would appear on the abstract of title.

THE COURT: Well, it would be in this case, anyway, wouldn't it?

MR. POWERS: I'm sorry?

THE COURT: It would in this case, anyway? You'd record the Notice of Lien against the vessel, and it includes all of the appurtenances.

MR. POWERS: What if the vessel has sunk? The vessel is 30 miles off the coast of Virginia and I want to assert my lien against the fishing history.

THE COURT: There you go.

MR. POWERS: I have no way to record that lien.

THE COURT: I'm not sure that's right, but that's an interesting one. I think your client in Virginia would be better off having some possibilities for securing the –

MR. POWERS: Let me pose another issue, Your Honor. Under a Rule (b) attachment, if I own property and my client has property in Virginia – Hampton, Virginia – and a lien holder in Virginia wants to arrest one of his vessels, to strong-arm him into giving [14] security for a disputed debt. And that happens all the time, Your Honor. Unfortunately, the realities of the industries, people have boats arrested. I gives them leverage.

THE COURT: I'm just trying to picture the setting. Go ahead.

MR. POWERS: Under a Rule (b) attachment, I could not do that if my client could be found within the district – in this case, Hampton, Virginia. You can't arrest my boat because I'm right here. You can sue me in personam. If on the other hand, the fishing history is an appurtenance and the maritime lien attachment a fishing history, you can come up to the District Court in Massachusetts and attach the Rule (b) property, being the fishing history in Gloucester here in Massachusetts because my client can't be found in Massachusetts. He doesn't have business up here. He doesn't own boats up here. So I'm going to run down into this courthouse and I'm going to attach his fishing permit by filing with National Marine Fisheries Service.

THE COURT: I'm not sure I understand how that would work. I mean, maybe it would work. I don't know.

MR. POWERS: That's my whole issue, Your Honor, is that there is a Pandora's box which is going to open untold issues, problems, ramifications, be it [15] added work for National Marine Fisheries Service or this court in responding to seizure actions of permit history. It affects the marine insurance industry to the extent that I am an underwriter who – if the valuation of that hull, if the survey done for valuation purposes to determine the insurable value, in fact, includes the fishing history and, therefore, by definition that fishing history is a legal appurtenance to the vessel, I have insured that fishing history. And when I pay the claim on that boat that sank 30 miles off the shore, I am now subrogated to your rights, including ownership of that fishing history. It makes no sense for now a British underwriter to control

who is going to get to fish or who is going to have the right to fish for that fishing history.

THE COURT: But of course they don't. The National Marine Fisheries does.

MR. POWERS: And therein lies the issue, Your Honor. It defies the traditional concepts of an appurtenance. Every example that the plaintiff cites is tangible equipment where people can protect their interests. Foreign creditors have a right to go after it and use it as security.

THE COURT: That's not true of freights.

MR. POWERS: I'm sorry, Your Honor?

[16] THE COURT: That's not true of freights.

MR. POWERS: Freights. If I'm a foreign creditor, I can go after the freights here in the United States.

THE COURT: If the freights don't just include the actual freight itself, they include the right to receive compensation for the transportation of the goods.

MR. POWERS: Correct.

THE COURT: Or that's the definition of freights. That's an intangible.

MR. POWERS: Correct. And there are ways that you can tender – but by the same token, freights are deemed to be appurtenances, Your Honor. They're a form of maritime property. They're not an appurtenance to the vessel.

THE COURT: I'm trying to remember. I think there's a case from this district. Maybe I am wrong.

There's a case from this district that treats freights as being included within appurtenances.

MR. POWERS: Your Honor, I beg to differ. If you arrest a vessel, you do not buy the fact of arresting the vessel also arrests the freights.

THE COURT: Okay. Well, you know –

MR. POWERS: Freights are usually going to be [17] in a bank account which you –

THE COURT: Schirmer Stevedore, this is a 9th Circuit case – I won't discount that – says that we assume for purposes of this opinion, the vessel includes freights. And the general rule is that if a maritime lien attaches to a vessel, it also attaches to its freights which are incident to the vessel.

MR. POWERS: The court did not hold –

THE COURT: And there's case law.

MR. POWERS: And I'm entirely familiar with the holding, Your Honor, but I beg to differ. I don't think they found that the freights were an appurtenance to the vessel. They are separate maritime property altogether.

THE COURT: If a maritime lien attaches to a vessel, it also attaches to its freights. What does that mean?

MR. SAUNDERS: Typically, Your Honor, the reason there's not a lot of case law on point in support of his position is the vessel owner would be attempting to collect a freight which is not earned until the goods are delivered at the port of destination. Therefore, the vessel

owner is not going to assert a lien on his own vessel. There is a concept known as sub-freights in which a vessel owner may have a lien on the goods which [18] are found on its deck. And that lien is to secure the freight paid to the vessel owner. I don't know if that is what the holding – I don't know what the case is which Your Honor is citing. But there's a similar case before Judge Gertner right now involving cars from Fall River to Haiti.

THE COURT: I'm sorry? Cargo from Fall River to Haiti?

MR. SAUNDERS: Fall River to Haiti. There's also the *Good Pasture* case, Your Honor, which deals with who has priority over those freights.

THE COURT: Well, I guess the argument is that the problem is manageability, right?

MR. POWERS: I think there's going to have to be some rules rewritten, Your Honor. NMFS or National Marine Fisheries Services will obviously have some internal problems with their own regulations as far as how business is going to be conducted, whether or not fishing permits or fishing histories can be sold – bought and sold on the open market to the highest bidder. I don't believe that's the way it works today and I don't think that's the way it was intended to work.

I respectfully point out again, Your Honor, that its going to be putting a lot of work on National [19] Marine Fisheries Service that they shouldn't otherwise be tasked with. Because it is not personal property other than a privilege bestowed by National Marine Fisheries Service. And to the extent that they're now going to have to

respond to Rule (c) and Rule (b) arrests everytime somebody wants to attach a fishing history or arrest a fishing history, it's going to be an increased workload. I think it still has jurisdictional problems which haven't been thought through as far as where do you rule the Rule (c) arrest? Where is the res? Where do you file the in rem proceeding?

THE COURT: No. That's not presented in this case. No.

MR. POWERS: I'm sorry, Your Honor?

THE COURT: That wasn't presented in this case.

MR. POWERS: No. I don't believe it was presented in this case, Your Honor. But it will, however, have an effect on subsequent cases.

THE COURT: Okay. Well, I've heard from the National Marine Fisheries Service here. And they – apart from assuring that I don't take a broad view of what constitutes what it is that the fishing history involves, they don't seem to be raising an objection. You know, I'm just going back at *Schirmer* again. [20] And the language is pretty broad. I don't see it being narrowly read. It says, "Maritime liens may be obtained against freight independent of any lien against the vessel. And we assume for the purpose of this opinion that the vessel includes the freights. Since the general rule is that the maritime lien attaches to the vessel, it also attaches to its freights." And then they cite *Gilmore* and *Black*.

MR. POWERS: But I believe, Your Honor, you just said that the lien attaches to the freights independent of the vessel.

THE COURT: Yes. It does that, too.

MR. POWERS: Well, in this case, Your Honor, I don't see how that could happen. I mean, if you're going to assert a lien against the fishing history, by definition, you have to assert the lien against the vessel because I don't see how you can provide the necessary services to a fishing history.

THE COURT: Well, it sounds like at least as far as *Schirmer* is concerned, that they suggest that you can have both an independent lien and a regular maritime lien – that is, against the vessel – which includes the freights as incident. It's been suggested that it's the sub-freights that we're talking about, I guess. I suppose dealing with analogies, it's not [21] always the most effective way of understanding these things. But I guess I'm not so bothered by it in this context. So, the Pandora's box argument. Anything else?

MR. POWERS: I just foresee a situation where another – another example – and I apologize for not having any coherent order of things. But I'm just trying to think off my feet.

If I'm allowed to transfer the permit, if a lien arises on a vessel – and by definition arises on the appurtenances, thereby the fishing history, and before that lien is asserted – suppose two years go by as happened in this case, Mr. Patenaude doesn't assert the lien. And in the interim, I have transferred that fishing history to another

vessel. Again, do we now have a lien on the vessel itself plus the fishing history which is attached to another vessel? Do you have a right to attach a Rule (b) attachment against that other vessel that has the fishing history and also a Rule (c) arrest to the vessel that you originally extended the credit to? Again, all I'm saying, Your Honor, is that I think that there is going to be a lot of far-reaching ramifications that will go beyond the MISS JENNA, issues of where lawsuits can be filed, whether or not you're going to be extending credit [22] depending on the citizenship of the parties. This whole concept of value, Your Honor, I think, is a bit of a red herring because it's so subjective. Under the rationale that it has value, just about anything can have value to a fishing vessel. And what may be valuable to one owner might not necessarily be of value to another.

THE COURT: Yes. I suspect, however, that the right to fish is probably right at the core of value to a fishing vessel.

MR. POWERS: Again, Your Honor, if I'm not going to be fishing in New England waters, I could really care less about a New England fishing permit. And, so, in that respect, it has little or no value to me at all.

THE COURT: Well, then you pay your price accordingly. You make your payment accordingly for it. You know, that's what property is. As I said, an air conditioner in Alaska is probably not very valuable, but it's still an appurtenance to the vessel.

MR. POWERS: Is there anything else that Your Honor would –

THE COURT: No, I don't think so. I think, as I said, I found Judge Carter's decision to be compelling here and I'm likely to act on that basis here, although I want to do a little bit more thinking about it.

* * *

[44] benefit of the remainder, I think it's the same thing. I think we're saying the same thing, Judge. I just want to make sure that Mr. McGregor and F&B Rubber do not have to write a check to the registry of the court on services they provided to the WEYMOUTH or to the MISS JENNA rather. That was the name of the vessel at the time.

THE COURT: I have to tell you I'm lost.

MR. SAUNDERS: Okay.

THE COURT: I really am lost by all of this. I was holding on for dear life, but it's gone now. I will look at the – give me an accounting that just tells me what these numbers are and what your numbers are. And I'm just going to have to work my way through it all by myself. But I will come up with an equitable way of dealing with this that has the least number of moving parts.

MR. SAUNDERS: Thank you, Your Honor.

THE COURT: That's all I can do. And I won't bother you anymore with trying to work it out.

Now, let me just ask: Does the Government have anything else that it wants to say?

MS. HEALY-SMITH: I came all this way.

Just to clarify, relative to the earlier discussion about implications of a ruling that says [45] this is appurtenant to a vessel, it would be – the regulatory scheme is what it is and it's going to govern what happens. It says permits are not transferrable [sic] independently or assignable.

What's at issue in a seizure is the fishing history, the permit eligibility of that vessel. If that vessel goes down, nobody can fish with the profile of that permit. But the owner can. And just because it might be of assistance in writing this up, I'll just refer the Court back to the earlier report we filed in September of '99 that talks about confirmation. An owner of a vessel who has a permit, if the vessel goes down, can apply to the agency to confirm that permit eligibility and essentially hold it in limbo until a later time that that owner might choose to have it assigned to a replacement vessel in accordance with the regulations.

I hope I haven't muddied the waters, but I did just want to make the clarification that it's the eligibility, the permit history of the vessel that is going to govern what the fishing rights are. And, therefore, the agency does not believe that you could independently get a lien on that fishing history because the regs. don't permit it.

THE COURT: Nor can you get an independent [46] lien on your permit itself.

MS. HEALY-SMITH: Correct.

THE COURT: You couldn't seize the permit itself.

MS. HEALY-SMITH: It's just paper.

THE COURT: Well, there are some things that are just paper that have a certain value. All right. I think I understand that.

I'm going to try and issue an order as of October 31st and hope to have a memorandum explaining the bases for what I have done here.

All right. Thank you very much.

RECESSED AT 4:45 P.M.

CERTIFICATE

I, PAMELA R. OWENS, Official Court Reporter, U.S. District Court, do hereby certify that the foregoing is a true and correct transcription of the proceedings taken down by me in machine shorthand and transcribed by same. I certify that the transcript fees charged and the page format used by me comply with the requirement of this Court's court reporter plan and the requirements of the Judicial Conference of the United States.

/s/ Pamela R. Owens 2/21/01

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FRANCIS PATENAUDE, Plaintiff v. FV MISS JENNA, O.N. 241175 (formerly FV WEYMOUTH), her engines, gear, tackle, apparel, furniture, equipment, and catch IN REM Defendant and NATIONAL MARINE FISHERIES SERVICE, PERMIT DIVISION; JON RITTGERS, In his official capacity as Acting Regional Administrator of the National Marine Fisheries Service; WILLIAM M. DALEY, In his official capacity as Secretary of Commerce; TIMOTHY DANIELS; and FV MISS JENNA, LLC, Defendants	CIVIL ACTION NO. 98-12351-DPW

JOINT STIPULATED FACTS

A. In accordance with the Court's directives at the hearing for a preliminary injunction on June 29, 1999, the

parties agree to the following stipulated facts, for the purpose of having the Court render a final judgment:

1. Plaintiff Francis Patenaude ("Patenaude"), at all times material hereto, was and is a citizen and resident of Fall River, Massachusetts.

2. The Defendant FV MISS JENNA, O.N. 241175 (formerly FV WEYMOUTH), documented pursuant to the laws of the United States, is a steel hulled fishing vessel, Certificate of Documentation length 102.5 feet with a 22 foot beam, of 170 gross tons, 115 net tons.

3. Defendant National Marine Fisheries Service, Permit Division ("NMFS"), is an agency of the United States with a Northeast Regional Office located at One Blackburn Drive, Gloucester, Massachusetts.

4. Defendant Jon Rittgers is NMFS' Acting Regional Administrator.

5. Defendant William F. Daley is the United States Secretary of Commerce.

6. Defendant Timothy Daniels ("Daniels") is an individual with a usual place of business at Old Point Packing Fish Co., Newport News, Virginia.

7. At all times material hereto, Daniels was the legally authorized agent of MISS JENNA, LLC. who made the business decisions involving transferring of fishing history and permit eligibility for or on behalf of defendant MISS JENNA, LLC., a limited liability Virginia corporation with a principal place of business at 1109 Lotus Street, Hampton, Virginia 23663.

8. This is a case of Admiralty and Maritime jurisdiction within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure.

9. The Court has jurisdiction pursuant to 28 U.S.C. §1361.

10. The Court has personal jurisdiction over Defendant Timothy Daniels and MISS JENNA LLC. At all times material hereto, they conducted business in Massachusetts.

11. Venue lies within this District under 28 U.S.C. §§ 1391(b) and (e).

12. On August 11, 1998, while the vessel was in Massachusetts, defendant MISS JENNA, LLC purchased the FV MISS JENNA, then known as the FV WEYMOUTH, pursuant to a Purchase and Sale Agreement, attached as Exhibit 1.

13. The scallop permit and summer flounder permit, No. 410037, referred to in the Purchase and Sale Agreement, is attached as Exhibit 14.

14. Defendant, MISS JENNA, LLC., purchased the FV WEYMOUTH with the clear understanding and intent that the fishing history and fishing rights conferred by fishing permit, No. 410037 were included with the sale of the FV WEYMOUTH.

15. On November 17, 1998, Plaintiff filed a motion to seize the FV MISS JENNA, by virtue of a maritime lien claim against the vessel which arose prior to and pre-existed the purchase of the vessel by MISS JENNA, LLC.

16. On November 19, 1998, the Court allowed Plaintiff's motion to seize the FV MISS JENNA.

17. Immediately prior to her seizure on November 27, 1998, the FV MISS JENNA had been operating in New England waters as a commercial fishing vessel and had landed catch on October 30 and November 24 in New Bedford, Massachusetts, as noted in NOAA Form Nos. 8804-1, 8804-2, and 8804-3. The catches sold for $54,026.00.

18. On November 27, 1998, the United States Marshal seized the FV MISS JENNA in New Bedford, Massachusetts.

19. Following her seizure, no bond was posted by the owners of the FV MISS JENNA and she accordingly remained seized.

20. At the time the vessel was seized, Permit No. 410037 conferred rights to fish for limited access scallops and summer flounder within the waters of the United States. The Permit remained aboard the vessel from the time of the seizure through the judicial sale on March 1, 1999. At no time did Daniels, MISS JENNA LLC, or anyone acting on their behalf go aboard the vessel or otherwise physically remove Permit No. 410037.

21. On or about December 8, 1998 defendant Timothy Daniels submitted an application to NMFS, for federal fisheries permits pursuant to 50 CFR 648.4 for the "replacement" of one vessel by another vessel and the transfer of fishing histories and limited access permit eligibility from the F/V MISS JENNA to a different vessel, the F/V TOP FLIGHT.

22. On December 14, 1998, Plaintiff moved for an interlocutory sale of the FV MISS JENNA, which was allowed and scheduled for March 1, 1999, to follow a bench trial on the merits of Plaintiff's *in rem* lien claim scheduled for January 29, 1999.

23. The FV TOP FLIGHT was another commercial vessel owned by KTM, Inc., 109 Lotus Street, Hampton, Virginia. Defendant Timothy Daniels was the legally authorized agent of KTM, Inc., who made the business decisions involving transferring of fishing history and permit eligibility for or on behalf of KTM, Inc. including the request to transfer the FV MISS

JENNA's fishing history and permit eligibility to the FV TOP FLIGHT.

24. After reviewing the application and supporting documentation for compliance with applicable law and regulations, including, *inter alia*, the requirements of 46 U.S.C. § 12102(a) and 50 CFR 648.4, and considering that the applicable law and regulations had been complied with, on or about December 24, 1999 NMFS authorized the transfer of the fishing history and permit eligibility from the F/V MISS JENNA to the F/V TOP FLIGHT. This transfer was effected by the issuance of new permits to the F/V TOP FLIGHT on or about January 5, 1999.

25. Between December 8, 1998 and January 5, 1999, the FV MISS JENNA remained seized pursuant to the Court's order of November 19, 1998 and under the control of the Court.

26. Once the eligibility to prosecute certain limited access fisheries was transferred from the FV MISS JENNA to the FV TOP FLIGHT on or about December 24, 1998, the FV MISS JENNA was unable to prosecute the fisheries identified in Permit No. 410037 within the waters of the United States.

27. On January 29, 1999 the Court ruled that the plaintiff had a valid *in rem* claim against the FV MISS JENNA. The amount of interest due the plaintiff and the amount, if any, due to three intervening claimants, Pier Oil, Inc., F & B Enterprises, Inc., and Robery [sic] MacGregor, d/b/a MacGreogor's [sic] Marine Engineering, has not yet been determined by the Court.

28. The fishing history and permit history to prosecute the limited access fisheries that had been associated with Permit No. 410037 and that were transferred to

the FV TOP FLIGHT, cannot be bought or sold from NMFS.

29. On February 16, 1999, Plaintiff made written inquiry of Defendant MISS JENNA LLC as to the location and status of the permit described in paragraph 20. Said written inquiry is attached [sic] Exhibit 18.

30. On February 18, 1999, Defendant MISS JENNA LLC responded that the permit described in paragraph 20 was, to its knowledge, still on board the vessel. Said response is attached as Exhibit 19.

31. The Plaintiff purchased the FV MISS JENNA "as is, where is" at a judicial sale in Fairhaven, Massachusetts on March 1, 1999 for $52,000. Plaintiff assumed that the fishing history and permit eligibility were part of the vessel, although he failed to inquire of NMFS as to the vessel's permit status prior to the sale. There was no representation or warranty by the Court that the judicial sale of the vessel included the fishing history or fishing rights.

32. The Court approved the judicial sale of the FV MISS JENNA to the Plaintiff on April 2, 1999.

33. After title to the FV MISS JENNA was transferred to the Plaintiff on April 5, 1999, and he sought to commercially fish the FV MISS JENNA for the species authorized by Permit No. 410037, Plaintiff inquired of NMFS for the appropriate permission and was advised by Defendant NMFS that the fishing history and limited access permit eligibility previously associated with said permit had been transferred to the FV TOP FLIGHT.

34. NMFS within its statutory mandate retains the authority to confirm the permit history of the FV MISS JENNA with Daniels or MISS JENNA LLC upon the conclusion of this litigation.

35. At the time the vessel was seized on November 27, 1998, she was insured by Sunderland Marine Mutual Insurance Co., Ltd. for $100,000 under Hull and Machinery Policy No. MF-0559. The vessel is presently insured by Lumberman's Mutual Casualty Co. for $250,000 under Hull and Machinery Policy No. 99/MA/09026.

36. On February 8, 2000, the F/V TOP FLIGHT was sold to Mexican buyers for $450,000, pursuant to a U.S. Coast Guard Bill of Sale attached hereto as Exhibit 6. The F/V TOP FLIGHT'S fishing history and permits were expressly excluded as part of the sale.

37. When MISS JENNA, LLC purchased the vessel on August 11, 1998, it did not have any valid federal fisheries permits because the previous owner had been sanctioned by NMFS for various violations. NMFS agreed to lift the sanctions upon transfer of the vessel's title to MISS JENNA, LLC, and on September 24, 1998, a new permit No. 410037 was issued by NMFS.

B. The following facts are stipulated to by the parties as to accuracy, but Timothy Daniels and MISS JENNA LLC object to them as being irrelevant to the issues before the Court:

38. Pursuant to applicable NMFS regulations, a commercial fishing permit such as Permit No. 410037, described in Paragraph 20, can only be transferred to a vessel with a length overall ("LOA") no more than ten percent longer than the vessel then owning the permit.

39. The LOA of the FV MISS JENNA is 109.9 feet, not the 102.5 described in its Certificate of Documentation.

40. The LOA of the FV TOP FLIGHT would have to be less than 121 feet in order for it to qualify as a replacement vessel under the applicable NMFS regulations.

41. The length of the FV TOP FLIGHT as listed on the United States Coast Guard Certificate of Documentation as 119.7.

42. Subsequent to making the transfer of fishing rights and permit eligibility from the F/V MISS JENNA to the F/V TOP FLIGHT, NMFS was advised that the length overall ("LOA") of the F/V TOP FLIGHT as listed on the vessel's Master Carpenter's Certificate is 125 feet. Therefore, the F/V TOP FLIGHT did not qualify as a replacement vessel for the permit and fishing history of the F/V MISS JENNA (now the F/V QUINCY) because, *inter alia*, its length exceeds the ten percent increase in vessel length allowed by federal regulations, including 50 CFR § 648.4(a)(I)(E)(2).

43. The December 24, 1998 fishing history and permit eligibility transfer to the FV TOP FLIGHT, described in Paragraph 20, was an invalid transfer of the fishing history and permit eligibility of the FV MISS JENNA under NMFS regulations.

44. Pursuant to Paragraph 1 of the Court's July 6, 1999 Order, NMFS invalidated the December 24, 1998 transfer of fishing and permit history from the F/V MISS JENNA to the F/V TOP FLIGHT. That action essentially restored the permit and fishing history to the F/V MISS JENNA (now the F/V QUINCY). Pursuant to Paragraph 2 of the Court's Order, NMFS processed the application of the Quincy Fishing Corp., for fishing permits for the F/V QUINCY based on the "restored" history.

45. The FV MISS JENNA, now FV QUINCY, is currently eligible pursuant to the Court order to hold the fishing permits identified in Paragraph 20, and said fishing permits have been transferred to the FV QUINCY (ex FV MISS JENNA).

46. Pier Oil, Inc., F & B Enterprises, Inc. and Robert MacGregor, d/b/a MacGregor's Marine Engineering, interenors [sic] in this litigation after January 29, 1999 obtained default judgments against FV MISS JENNA, LLC., in the New Bedford Third District Court in the amounts of $9,728.67 for Pier Oil, $911.33 for F & B Enterprises and $1,568.50 for MacGregor's Marine Engineering.

47. Between December 8, 1998 and January 5, 1999, the MISS JENNA, LLC. was represented by counsel who were aware that the FV MISS JENNA had been seized and remained under control of the Court.

48. Between December 8, 1998 and January 5, 1999 the Defendant Timothy Daniels was aware that the FV MISS JENNA remained seized pursuant to the Court's order of November 19, 1998 and under the control of the court.

49. On or about December 16, 1998, counsel for MISS JENNA, LLC forwarded a letter to NMFS attached hereto as Exhibit 15.

FRANCIS PATENAUDE
By His Attorneys

/s/ Bertram E. Snyder
Bertram E. Snyder
(BBO #471380)
Benjamin D. Stevenson
(BBO #638121)
LOONEY & GROSSMAN, LLP
101 Arch Street
Boston, MA 02110

TIMOTHY DANIELS; FV MISS JENNA LLC.; FV MISS JENNA, O.N. 241175
By Their Attorneys

/s/ Edward J. Powers
Edward J. Powers
VANDEVENTER BLACK, LLP
500 World Trade Center
Norfolk, VA 23510

Robert E. Collins
(BBO #555843)
CLINTON & MUZYKA, P.C.
One Washington Mall, Suite 1400
Boston, MA 02108

NATIONAL MARINE FISHERIES SERVICE, PERMIT DIVISION; JON RITTGERS; WILLIAM DALEY
By Their Attorneys

Barbara Healy Smith
Assistant U.S. Attorney
U.S. Courthouse, Suite 9200
1 Courthouse Way
Boston, MA 02210

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Francis Patenaude, Plaintiff, v. FV MISS JENNA, O.N. 241175 (formerly FV WEYMOUTH,) her engines, gear, tackle, apparel furniture, equipment, and catch *IN REM* Defendant and NATIONAL MARINE FISHERIES SERVICE, PERMIT DIVISION; JON RITTGERS, In his official capacity as Acting Regional Administrator of the National Marine Fisheries Service; WILLIAM M. DALEY, In his official capacity as Secretary of Commerce; TIMOTHY DANIELS; and FV MISS JENNA, LLC, Defendants.	CIVIL ACTION NO. 98-12351-DPW

PRELIMINARY INJUNCTION
July 6, 1999

After hearing and review of the submissions of the parties, for reasons stated during the hearing in this matter on June 29, 1999, and pending further order of this court, it is hereby ORDERED:

1. That the National Marine Fisheries Services ("NMFS") shall forthwith take the administrative steps necessary to invalidate the December 1998/January 1999 transfer of fishing and permit history from the F/V Miss Jenna (O.N. #241175) (Now (F/V Quincy) to the replacement vessel, the F/V Top Flight, thereby restoring the Miss Jenna's (now (F/V Quincy) permit eligibility to what it was in December 1998.

2. That NMFS shall, within one week from the date of order, process and take action on the June 23, 1999 Initial Permit Application of the Quincy Fishing Corp. for the following permits:

Open Access Multispecies Handgear
Open Access Multispecies Scallop/Multispecies possession Limit
Open Access Multispecies Non-Regulated Multispecies
Limited Access Full Time Sea Scallop
Open Access Surfclam
Open Access Ocean Quahog
Limited Access Summer Flounder
Open Access Squid/Butterfish Incidental Catch
Open Access Atlantic Mackerel

3. That NMFS shall report within sixty days of the date hereof the results of its review whether the F/V Top Flight (O.N. 634318) qualifies under applicable regulations and agency policy as a replacement vessel for the fishing history and permit eligibility of the F/V Miss Jenna (O.N. 241175) (now F/V Quincy).

4. That defendants, to assist NMFS in completing the review ordered in ¶ 3, *supra*, Timothy Daniels and F/V Miss Jenna LLC shall have an independent marine

surveyor measure the length overall of the F/V Top Flight and to submit documentation of the results of such survey in a form acceptable to NMFS within five business days of the date hereof, or in lieu of such survey to agree to the length listed on the master carpenter's certificate submitted to the Court on June 29, 1999 with the Affidavit of Bertram E. Snyder.

5. That defendants Timothy Daniels and F/V Miss Jenna LLC shall not transfer or use in any manner on the F/V Top Flight (O.N. 634318) or any other vessel they own or control, any fishing history or other rights obtained on or about December 24, 1998 from NMFS formerly belonging to the F/V Miss Jenna (O.N. 241175).

6. That the Quincy Fishing Corp. shall, upon receipt of its federal fishing permit for the F/V Quincy, be allowed to fish in accordance with the permit and applicable federal fishing regulations.

7. That, as security pending a final resolution of this litigation, plaintiff shall hold in escrow in an interest bearing account in a bank within the jurisdiction of this Court, the net profits of the boat share of 42% of any fishing trips made by the F/V Quincy O.N. 241175 after the date of this order until final judgment or further order of this court.

8. That the F/V Quincy (O.N. 241175) will settle with Jardin Dawson Settlements, 84 Front Street, New Bedford, MA 02740, and defendants shall have access during regular business hours to the review of all settlement data.

9. That plaintiff 30 days after the completion of the first fishing trip on the F/V Quincy (O.N. 241175) and every 30 days thereafter will provide defendants Timothy Daniels and F/V Miss Jenna LLC with copies of any settlement sheets, and NOAA Form No. 88-30.

/s/ Douglas P. Woodlock
DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT
JUDGE

Supreme Court, U.S.
FILED
AUG 2001
OFFICE OF THE CLERK

No. 01-0126

In The

Supreme Court of the United States

TIMOTHY DANIELS AND F/V MISS JENNA, LLC,

Petitioners,

v.

FRANCIS PATENAUDE AND THE NATIONAL MARINE FISHERIES SERVICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT FRANCIS PATENAUDE'S BRIEF IN OPPOSITION

BERTRAM E. SNYDER
Counsel of Record
BENJAMIN D. STEVENSON
LOONEY & GROSSMAN, LLP
101 Arch Street
Boston, Massachusetts 02110
(617) 951-2800

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a limited access fishing permit, issued to a commercial fishing vessel by the National Marine Fisheries Service on a limited basis pursuant to applicable federal regulations, is an appurtenance of the vessel subject to a maritime lien.

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ADDITIONAL REGULATIONS INVOLVED

50 C.F.R. § 648.4(a)(1)(i)(A):

> Eligibility. To be eligible to apply for a limited access multispecies permit, as specified in § 648.82, a vessel must have been issued a limited access multispecies permit for the preceding year, be replacing a vessel that was issued a limited access multispecies permit for the preceding year, or be replacing a vessel that was issued a confirmation of permit history.

50 C.F.R. § 648.4(a)(1)(i)(C):

> Qualification restriction. Unless the Regional Administrator determines otherwise, no more than one vessel may qualify, at any one time, for a limited access permit or CPH based on that or another vessel's fishing and permit history. If more than one vessel owner claims eligibility for a limited access permit or CPH, based on one vessel's fishing and permit history, the Regional Administrator will determine who is entitled to qualify for the permit or CPH and any DAS allocation according to paragraph (a)(1)(i)(D) of this section.

50 C.F.R. § 648.4(a)(1)(i)(D):

> Change in ownership. The fishing and permit history of a vessel is presumed to transfer with the vessel whenever it is bought, sold, or otherwise transferred, unless there is a written agreement, signed by the transferor/seller and transferee/buyer, or other credible written evidence, verifying that the transferor/seller is retaining the vessel's fishing and permit history for purposes of replacing the vessel.

50 C.F.R. § 648.4(a)(1)(i)(L):

> Restriction on permit splitting. A limited access permit issued pursuant to this section may not be issued to a vessel or its replacement or remain valid, if the vessel's permit or fishing history has been used to qualify another vessel for another Federal fishery.

STATEMENT OF THE CASE

On November 17, 1998, Respondent Francis Patenaude ("Respondent") filed the underlying in rem admiralty action against the F/V MISS JENNA, seeking to enforce a maritime lien for various necessaries which he supplied the vessel over the course of several years. (App. 29, ¶ 15). Respondent simultaneously filed a motion to seize the F/V MISS JENNA, which motion was allowed by the District Court on November 19, 1998. (App. 29, ¶ 16). On November 27, 1998, the United States Marshal seized the F/V MISS JENNA in New Bedford, Massachusetts. (App. 30, ¶ 18). At the time of her seizure, the F/V MISS JENNA was owned by the Petitioner F/V MISS JENNA, LLC. (App. 29, ¶ 12). At all times relevant, Petitioner Timothy Daniels was the legally authorized agent of F/V MISS JENNA, LLC, and made all decisions regarding the handling and transfer of the F/V MISS JENNA's fishing permits, fishing history, and permit eligibility. (App. 28, ¶ 7).

At the time the F/V MISS JENNA was seized, she had posted in her wheelhouse Permit No. 410037, which conferred rights to fish for limited access scallops and summer flounder within the waters of the United States.

(App. 30, ¶ 20). Under applicable National Marine Fisheries Service ("NMFS") regulations, the F/V MISS JENNA also had a corresponding "fishing history" or "permit eligibility," which is a record of fish caught by the vessel over time, and which is generally used by NMFS to determine whether a vessel qualifies for a limited access fishing permit and what that vessel's permit will allow. (App. 25). Consistent with the practice of the lower courts and the parties, Respondent sometimes refers to the permit alone when both the permit and the corresponding permit history are meant. *See Gowen, Inc. v. F/V Quality One*, 244 F.3d 64, 65 n.1 (1st Cir. 2001).

On or about December 8, 1998, while the F/V MISS JENNA and her Permit No. 410037 remained under the custody of the U.S. Marshal, Petitioner Daniels, without notice to the Court and without informing NMFS that the F/V MISS JENNA was in custodia legis, applied to NMFS to transfer the F/V MISS JENNA's fishing history and permit eligibility – essentially, the right to apply for a new limited access permit – to a different vessel under his ownership or control, the F/V TOP FLIGHT. (App. 30, ¶ 21). Approximately two months later, in response to the Respondent's written inquiry as to the location and status of the F/V MISS JENNA's limited access fishing permit, Petitioner stated that to his knowledge, the limited access fishing permit was still on board the vessel. (App. 32, ¶¶ 29, 30).[1]

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[1] It is true that Permit No. 410037 was at all times on display in the wheelhouse of the F/V MISS JENNA. However, Petitioners violated federal regulations and misled creditors by allowing the physical permit to remain on display, apparently

On March 1, 1999, following Petitioners' representation that the limited access permit was still with the vessel, Respondent purchased the F/V MISS JENNA at a judicial sale. (App. 32, ¶ 31). The F/V MISS JENNA was in generally poor condition, and had little value apart from its fishing permits. (App. 14). After title to the F/V MISS JENNA was transferred to the Respondent, he applied to NMFS to use the vessel's fishing history to obtain a new limited access permit, and was for the first time advised that Petitioners had transferred the necessary fishing history and permit eligibility to the F/V TOP FLIGHT. (App. 32, ¶ 33).

Respondent subsequently successfully moved for a preliminary injunction invalidating Petitioners' transfer of the F/V MISS JENNA's fishing history and permit eligibility on the ground that that they, together with the permit, were an appurtenance of the seized vessel subject to his lien. NMFS did not object. (App. 21). Following submission of stipulated facts and oral argument, the District Court issued a final judgment on October 31, 2000, confirming its prior ruling and holding that the fishing history and associated fishing permit were appurtenances of the F/V MISS JENNA which transferred to the Respondent when he bought the vessel at judicial sale. (App. 4-5). The Court did not issue a formal opinion. The First Circuit Court of Appeals summarily affirmed

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"issued" to the F/V MISS JENNA, after having used the F/V MISS JENNA's permit or fishing history to qualify the F/V TOP FLIGHT. *See* 50 C.F.R. § 648.4(a)(1)(i)(L).

the District Court's decision on April 20, 2001, relying on its recent decision in *Gowen*.[2]

REASONS FOR DENYING THE WRIT

I. There is no conflict between circuit courts of appeal and/or state courts of last resort; there is no important question of federal law; and the First Circuit based its decision on a properly stated rule of law.

None of the Supreme Court Rule 10 criteria for granting certiorari exist. There is no conflict between the First Circuit's decision in *Gowen* and any other United States court of appeals or state court of last resort, and no court has held that fishing permits are not an appurtenance of a modern commercial fishing vessel. Because the principal purpose of granting certiorari is to resolve conflicts among circuit courts of appeals and state courts concerning the meaning of provisions of federal law, the writ should be denied. *See Braxton v. U.S.*, 500 U.S. 344 (1991).

Nor is the question presented an especially important issue of federal law. While importance is subjective, the significance of a case should at least generally depend on how many other persons, apart from the litigants, will be affected by the questions presented. *See* Robert L. Stern, et al., *Supreme Court Practice* § 6.31(b) (6th ed. 1986). To date, only two cases (this case and *Gowen*) have directly litigated the issue of whether a vessel's fishing permit is subject to a maritime lien. In both cases, the courts

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[2] A Petition for Writ of Certiorari in the *Gowen* case is currently pending before this Honorable Court, Docket No. 01-19.

decided that it is. Two decisions from the same circuit coming to the same conclusion on a rarely litigated issue do not justify certiorari.

Clearly the better approach is to let additional lower courts address the issue presented in this case before granting certiorari. Justice Brennan once revealed that "there is already in place, and has been ever since I joined the Court [in 1956], a policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question." Justice Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 Judicature 230, 233 (1983). *See also, McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied where issue requires "further study" in lower courts "before it is addressed by this Court"); *Gilliard v. Mississippi*, 464 U.S. 867 (1983) (Marshall, J., dissent from denial of certiorari addressed to "those of my Colleagues who agree with me [on merits of issue] but believe that this Court should postpone consideration of the issue until more state supreme courts and federal circuits have experimented with substantive and procedural solutions to the problem"). Indeed, this Court recently declined to review an admiralty issue which is more common than that presented here, and which involved a clear split of authorities among the Circuits. *See Sisson v. Ruby*, 497 U.S. 358, 365 n.4 (1990) (declining to review test for determining "traditional maritime activity," despite split between Second, Fourth, Fifth, Sixth, and Seventh Circuits).

Finally, regardless of the ultimate decision in *Gowen*, there is no question that the First Circuit in that case applied a properly stated rule of law regarding what constitutes an appurtenance of a vessel. A petition for a

writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law. *See* Supreme Court Rule 10. Petitioners do not challenge, nor can they, the basic rule of law as stated and relied upon by the First Circuit: "Traditionally, a maritime lien attaches not only to the bare vessel but also to equipment that is used aboard the vessel and is 'essential to the vessel's navigation, operation, or mission.' " *Gowen*, 244 F.3d at 67, *citing Gonzalez v. M/V Destiny Panama*, 102 F.Supp.2d 1352, 1356 (S.D.Fla. 2000); *United States v. F/V Sylvester F. Whalen*, 217 F.Supp. 916, 917 (D.Me. 1963). Because the First Circuit undoubtedly applied the correct legal standard, the writ should be denied.

II. The First Circuit's *Gowen* decision is correct, as is its summary affirmance of the District Court's decision in this case.

Despite Petitioners' best efforts to portray it otherwise, the First Circuit's decision in *Gowen* simply applies, in a straightforward manner, well accepted admiralty law principles and policy to a new issue arising out of a recent federal moratorium on the issuance of fishing permits for certain potentially threatened species. Far from a "rogue" decision, *Gowen* is in complete accord with long-standing admiralty rules regarding maritime liens and appurtenances. The First Circuit is not making new law, but is instead simply applying established legal doctrines to a new issue.

The First Circuit and District Court below correctly recognized that in a modern era of limited access fisheries, fishing permits fall cleanly within the well-established definition of a vessel appurtenance. "An appurtenance is commonly defined as an item that is essential to the ship's navigation, operation, or mission." *E.g., Gonzalez*, 102 F.Supp.2d at 1354, *citing Stewart & Stevenson Servs., Inc. v. M/V Chris Way MacMillan*, 890 F.Supp. 552, 561-62 (N.D.Miss. 1995); *Payne v. SS Tropic Breeze*, 274 F.Supp. 324, 330 (D.P.R. 1967), *rev'd on other grounds*, 412 F.2d 707 (1st Cir. 1969); *F/V Sylvester F. Whalen*, 217 F.Supp. at 917; *The Witch Queen*, 30 F.Cas. 396, 397 (D.Calif. 1874). In today's world of extensive federal regulation and limited access fisheries, it is hard to imagine what could be more necessary to a fishing vessel than its required permits and fishing history.

In the words of the District Court in this case, "there is very little that serves the purpose of a fishing vessel more than the right to fish." (App. 9). This essential point was also plainly recognized by the District Court in *Gowen*: "[T]here can be no doubt that a commercial fishing permit is as vital as the nets to the mission of a fishing vessel." *Gowen, Inc. v. F/V Quality One*, 2000 U.S. Dist. LEXIS 8587, *10 (D.Me., June 14, 2000). Indeed, in an era of limited access fisheries, "fishing permits are apparently more integral to [a fishing vessel's] future as a commercial fishing vessel than is the tangible equipment, because the permits, unlike the rest of the appurtenances, are extremely difficult to replace." *Id.*

The lower courts also correctly held that recognizing fishing permits as appurtenances of a vessel furthers the purposes of maritime liens and the appurtenance rule

generally. A basic purpose of maritime liens is to make readily available to a mobile borrower the secured credit that is often necessary to ensure that a vessel can obtain the basic supplies or services needed for its operation. *Gowen*, 244 F.3d at 68, *citing Stewart & Stevenson Servs.*, 890 F.Supp. at 562; *Bavely v. Wandstrat*, 146 B.R. 963, 971 (Bankr. S.D.Ohio 1992), *affirmed*, 153 B.R. 781 (S.D.Ohio 1993); 29 *Moore's Federal Practice* § 705.01[1], at 705-7 (3d ed. 2000). In today's regulatory environment, marine suppliers recognize that the value of a commercial fishing vessel to which they extend credit is closely tied to the value of the vessel's permits. (App. 11-15). *See also, Gowen*, 244 F.3d at 68 ("For present purposes, what matters is that vessels . . . are valuable significantly, and sometimes almost entirely, because of their permits.").

As a practical matter, holding that permits are not appurtenances could have a serious impact on those involved in commercial fishing, because marine suppliers would be more reluctant to extend much needed credit to vessels. *See Gowen*, 2000 U.S. Dist. LEXIS 8587, *11 n.6. As noted by the District Court in *Gowen*, the basic principle behind the appurtenance rule is that marine suppliers extend credit based on the entire vessel as a going concern, rather than on the hull and cabin alone. *Id., citing The Hope*, 191 F. 243, 245 (D.Mass. 1911). Generally speaking, fishermen such as Petitioner Daniels seeking repairs and supplies on credit are likely to benefit from treating a vessel's permits as appurtenances. *See Gowen*, 244 F.3d at 69-70.

That fishing rights are intangible is a difference without consequence. As correctly noted by the Court of Appeals, there is no general objection to treating an

intangible as an appurtenance and therefore subject to a maritime lien as, for example, intangible freight charges due on account of a vessel's carriage of cargo are routinely subject to maritime liens against the vessel.[3] *See Gowen*, 244 F.3d at 68, *citing United States v. Freights of the Mount Shasta*, 274 U.S. 466, 469-70 (1927). Further, although it is true that traditionally most items deemed to be appurtenances have been tangible, the appropriate legal test focuses on whether an item has value and is essential to the operation of a vessel, not on whether it is tangible or intangible property. *Stewart & Stevenson Servs.*, 890 F.Supp. at 561-62. *See also, The Joseph Warner*, 32 F.Supp. 532 (D.Mass. 1939).

III. Petitioners' "Pandora's Box" of hypothetical conflicts do not justify granting certiorari.

Ignoring the fact that fishing permits fall cleanly within the well established definition of an appurtenance, and that recognizing permits as appurtenances of the vessels they serve furthers the goals of maritime liens and the appurtenance rule generally, Petitioners instead conjure a litany of hypothetical conflicts – both procedural

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[3] Petitioners are correct that maritime liens generally attach directly to a vessel owner's intangible rights in freight charges due on account of a vessel's carriage of cargo, whereas the instant case presents the question of whether a maritime lien can indirectly reach the intangible fishing history as an "appurtenance" to the vessel. However, that is a procedural distinction without any substantive policy difference. The cases addressing freight charges teach that there is no general policy objection to maritime liens reaching intangible rights.

and conceptual – in support of granting certiorari. Hypothetical conflicts which have not yet arisen in the lower courts should not provide the basis for certiorari, but Petitioners' concerns are greatly exaggerated in any event.[4]

1. The *Gowen* decision does not violate the doctrine that maritime liens are *stricti juris*, and does not interfere with NMFS policy or regulations.

Petitioners argue that *Gowen* violates the doctrine that maritime liens are *stricti juris* and should not be extended by construction, analogy, or inference. *See Racal Survey USA, Inc. v. M/V Cont Fleet*, 231 F.3d 183 (5th Cir. 2000). The argument fails because this case does not establish any new type of maritime lien. Indeed, Respondent's claim under a maritime contract for the supply of "necessaries" to the F/V MISS JENNA is among the most traditional of maritime liens. The question presented is whether Respondent's traditional maritime lien applies to the fishing permits of the F/V MISS JENNA, as appurtenances of the vessel.

In any event, while it has been said that the courts cannot create a new lien, this Court has declared that "this does not mean that the right to the lien is not to be recognized and upheld, when within accepted supporting principles merely because the circumstances are unusual

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[4] In the words of the District Court in this case, Petitioners' hypothetical concerns "are very interesting cases for someone else." (App. 14).

or infrequent." 2 *Benedict on Admiralty* § 21 at 2-5 (7th ed. 1994), *citing Krauss Bros. Lumber Co. v. Dimon S.S. Corp.*, 290 U.S. 117 (1933). Also, contrary to Petitioners' contention that admiralty law should not recognize new forms of maritime liens, it is well established that federal courts have full authority to update old doctrines and to recognize new forms of liens if warranted by new conditions. *See Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603 (1991), *on remand* 780 F.Supp. 191 (S.D.N.Y. 1991) (advances made by ship's agent may give rise to a maritime lien); *Equilease Corp. v. M/V Sampson*, 793 F.2d 598 (5th Cir. 1986) (unpaid insurance premiums give rise to a maritime lien). *See also,* Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 9-1 at 486 (2d ed. 1994). In a new era of strictly regulated fishing rights, federal courts are well within their power to hold that limited access permits are appurtenances of vessels subject to maritime liens.

Nor does *Gowen* interfere with NMFS policy or regulations. Importantly, NMFS was an active party to the proceedings below, and apart from asking that the District Court not take too broad a view of the rights involved, it had no objection to finding that fishing permits are appurtenances of a vessel. (App. 21). Petitioners' argument that fishing permits cannot be appurtenances because they are not considered property under applicable statutes and NMFS regulations fails because it is a long standing principle of the lien system that all appurtenances to a vessel are subject to a maritime lien,

regardless of ownership interests.[5] *See Gowen*, 2000 U.S. Dist. LEXIS 8587, *8, *citing SS Tropic Breeze v. Tropical Commerce Corp.*, 456 F.2d 137, 141 (1st Cir. 1972) (cement loading equipment appurtenant to cement carrier regardless of ownership); *F/V Sylvester F. Whalen*, 217 F.Supp. at 917 (leased fathometer and radar appurtenant to vessel despite lessor having title to equipment). Also, according to NMFS regulations, the property right in question is not the physical permit itself, which may be in the nature of a revocable right, but is rather the *eligibility to apply* for a limited access permit, based on a vessel's fishing and permit history:

> "If more than one vessel owner claims eligibility for a limited access permit or CPH, based on one vessel's fishing and permit history, the Regional Administrator will determine who is entitled to qualify for the permit . . . ." 50 C.F.R. § 648.4(a)(1)(i)(C).

Petitioners also argue that *Gowen* is inconsistent with NMFS's regulation of limited access fisheries. In fact, *Gowen* is in complete agreement with NMFS regulations instructing that fishing rights attach to vessels, not their owners. *See* 50 C.F.R. § 648.4(a)(1)(i)(A) ("To be eligible to apply for a limited access multispecies permit, as specified in § 648.82, *a vessel must have*. . . . "); 50 C.F.R. § 648.4(a)(1)(i)(C) ("Unless the Regional Administrator

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[5] Given Petitioners' attempt to transfer the rights conferred by the permit and fishing history while the F/V MISS JENNA was in custody, their aggressive litigation of this matter at the district court level, and their appeal to this Court, it is ironic that they now assert there is no property interest in the permits.

determines otherwise, no more than one *vessel may qualify*, at any one time, for a limited access permit . . . ."); 50 C.F.R. § 648.4(a)(1)(i)(D) ("The fishing and permit history of a vessel is presumed to *transfer with the vessel* whenever it is bought, sold, or otherwise transferred . . . .") (emphasis supplied).

The drafters of the regulations controlling limited access permits were clearly of the opinion that the right to fish should attach and be an appurtenance to vessels, not their owners. Their reasoning was that it is the size, type, and number of vessels which most directly affects fish stocks, not the circumstance of who owns those vessels. *See generally*, National Oceanic and Atmospheric Administration, Proposed Rule, Guidelines for Fishery Management Plans, 47 FR 27228, 27237-8 (1982 WL 137388 (F.R.)) (June 23, 1982). Because the regulators' focus was on limiting the size and number of vessels prosecuting fisheries, the right to fish at all is linked to a vessel, not its owner. The National Oceanic and Atmospheric Administration's statement of purpose is clear:

> "A moratorium is important to the effort reduction program because it enhances the predictability of the effect of effort reductions on total mortality and it reduces the impact of the effort reductions on individual participants. To insure some control on the predictability of the effort reduction program, *a finite number of units of effort, i.e., fishing vessels, is necessary.*" (emphasis supplied).

59 FR 9872, 9875 (1994 WL 58090 (F.R.)) (March 1, 1994).

Federal courts likewise recognize that vessels, not owners, are either eligible or ineligible for commercial fishing permits and other documentation under federal maritime law. *Southeast Shipyard Ass'n v. U.S.*, 979 F.2d 1541, 1544 (D.C. Cir. 1992). Fishing and other endorsements are issued to vessels, not their owners. *See id., citing* 46 U.S.C. § 12106(d)(1) ("A *vessel may be issued* a certificate of documentation with a coastwise endorsement if. . . .); § 12108(c) ("A fishery endorsement to engage in fishing . . . may be issued *to a vessel* that. . . . ") (emphasis supplied). The endorsement, if granted, goes with the vessel. *See id.*

NMFS itself has raised none of the concerns now relied upon by Petitioners. The *Gowen* decision comports with federal caselaw and NMFS regulations, and the writ should be denied.

2. Petitioners' hypothetical concerns regarding the application of the Supplemental Rules for Certain Admiralty and Maritime Claims do not justify granting certiorari

Primarily focusing on the intangible nature of a vessel's fishing history, Petitioners offer various potential problems regarding the applicability of the Supplemental Rules for Certain Admiralty and Maritime Claims to the arrest and sale of a vessel's intangible fishing privileges. Most importantly, however, none of Petitioners' hypothetical procedural concerns have yet arisen or been adjudicated in an actual case. The mere fact that lower courts may have to further tailor the application of the Supplemental Rules certainly does not justify granting certiorari,

and at a minimum, this Court should wait for an actual conflict to arise. For this reason alone, Petitioners' hypothetical procedural concerns can be wholly ignored.

Petitioners' concerns about the procedural mechanism for arresting and selling vessels along with their permits are greatly overrated in any event. The Supplemental Rules have already twice proven themselves equal to the task in this case and *Gowen*, where the litigants worked through the procedural issues without undue problems. Notably, Petitioners raised no objections about the procedures involved in the arrest and judicial sale at the trial court level.

Petitioners also posit several jurisdictionally based concerns arising out of the as yet undetermined issue of whether a vessel's fishing permit is deemed to legally reside on board the vessel or at the regional NMFS offices. All of Petitioners' hypothetical concerns rely on the significant assumption that a vessel's permits would be deemed to reside at NMFS regional offices – a position which seems especially debatable given the well established NMFS view that permits issue to vessels. If permits are in the future deemed to legally reside on vessels, Petitioners' concerns evaporate.

In a related hypothetical, Petitioners surmise that if a creditor has a maritime lien against a fishing vessel and its permit, the vessel is subsequently lost at sea, and the owner then transfers the permit to another vessel, the creditor might then assert his maritime lien against the second vessel. Petitioners argue that "it stands to reason" that the creditor's maritime lien on the fishing permit would follow to the replacement vessel, thereby giving

the creditor the right to proceed *in rem* against the new vessel, despite having no lien against the vessel itself.

The argument fails because the creditor in this situation never has a maritime lien directly against the fishing permit; rather, the creditor's maritime lien reaches the fishing permit only to the extent that it is an appurtenance of the original vessel when the vessel is seized. This being so, existing admiralty rules are sufficient to resolve the issue. If the owner takes no steps to transfer the permit away from the lost vessel, it remains a part of that vessel which may be salvaged, and thus subject to the creditor's maritime lien. *See, e.g., Walsh v. Tadlock,* 104 F.2d 131 (9th Cir. 1939) (maritime lien may hold on portion of vessel which remains or can be reached after vessel is lost); *Chapman v. Engines of the Greenpoint,* 38 F. 671 (S.D.N.Y. 1889) (liens on vessel destroyed attached to engines salvaged from the wreck). If, on the other hand, the owner transfers the permit to another vessel before the creditor seizes the res, then the permit would become an appurtenance of the second vessel outside the scope of the creditor's maritime lien, just as if the vessel owner had transferred a radar, radio, or other appurtenance prior to seizure. Maritime liens against the first vessel do not "carry over" to the second vessel on the back of a transferred appurtenance.

Petitioners' hypothetical problems regarding the applicability of the Supplemental Rules, to the extent they exist at all, are questions for another day.

3. *Gowen* promotes uniformity within the law of admiralty

Citing the need for uniformity of maritime law, Petitioners argue that the First Circuit's decision in *Gowen* creates uncertainty because permits are issued on a regional basis and are species specific. As such, Petitioners argue, the value of a particular fishing history or permit eligibility may depend on the type of fish being harvested or where the vessel is operated. The argument merely recognizes the longstanding reality that what may be necessary for one vessel's mission is not necessarily so for another's, and that the relative value of a vessel's appurtenances will always vary with circumstances. As recognized by the District Court in this case, for example, an air conditioner might not be valuable to a person fishing in Arctic waters, but it can still be an appurtenance elsewhere. Petitioners' argument is really only about what value is going to be attached to a particular appurtenance. (App. 12-13).

CONCLUSION

There is no conflict between circuit courts of appeals or state courts of last resort on the question presented. The question is of limited importance, and the Court of Appeals in *Gowen* applied correctly stated legal principles in reaching its decision. The *Gowen* decision was correctly decided, and Petitioners' hypothetical conflicts do not

justify granting certiorari. For all these reasons, the writ should be denied.

Respectfully submitted,

BERTRAM E. SNYDER
Counsel of Record
BENJAMIN D. STEVENSON
LOONEY & GROSSMAN, LLP
101 Arch Street
Boston, Massachusetts 02110
(617) 951-2800

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No. 01-126

In the Supreme Court of the United States

TIMOTHY DANIELS AND F/V MISS JENNA, LLC,
PETITIONERS

v.

FRANCIS PATENAUDE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

JOHN C. CRUDEN
Acting Assistant Attorney General

ANDREW MERGEN
SEAN H. DONAHUE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether fishing privileges that are granted to vessels under the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 (1994 & Supp. V 1999), and regulations thereunder, are appurtenances of the vessel and thus subject to a maritime lien against the vessel.

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In the Supreme Court of the United States

No. 01-0126

TIMOTHY DANIELS AND F/V MISS JENNA, LLC,
PETITIONERS

v.

FRANCIS PATENAUDE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1-2) and the district court (Pet. App. 3-5) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2001. The petition for a writ of certiorari was filed on July 19, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Magnuson-Stevens Fishery Conservation and Management Act (Act), 16 U.S.C. 1811(a), declares the "sovereign rights and exclusive fishery management authority" of the United States within a extending from 3 to 200 miles from the Nation's coasts. The Act assigns to the Secretary of Commerce (Secretary) the authority to manage and conserve coastal fisheries, and provides for a comprehensive program for the management of our Nation's fisheries. See 18 U.S.C. 1811; 16 U.S.C. 1851, 1861 (1994 & Supp. V 1999). The National Marine Fisheries Service (NMFS) is the principal component of the Department of Commerce charged with implementing the Act.

The Act authorizes regional fishery management councils or the Secretary to allocate fishing privileges. 16 U.S.C. 1852(a), 1853(b)(6) (1994 & Supp. V 1999). Regional councils may allocate fishing privileges "by licensing of vessels, gear, or fishermen." 50 C.F.R. 600.330(c)(1). In the multispecies and scallop fisheries subject to the permit involved in this case, permit eligibility is based on an initial showing that a vessel has met specific permit and fishing history requirements, and that the permit has been renewed each year since its initial issuance. 50 C.F.R. 650.4, Pt. 651 (1994). A vessel is not eligible for a multispecies permit unless it was issued such a permit in the preceding year or replaced a vessel that was issued such a permit (or was issued a confirmation of permit history). 50 C.F.R. 648.4(a)(1)(i).

When a vessel is "bought, sold, or otherwise transferred," "[t]he fishing and permit history of a vessel is presumed to transfer with the vessel * * * unless there is a written agreement, signed by the transferor/

seller and transferee/buyer, or other credible written evidence, verifying that the transferor/seller is retaining the vessel's fishing and permit history for purposes of replacing the vessel." 50 C.F.R. 648.4(a)(1)(i)(D). The fishing permit itself, however, is "valid only for the fishing vessel, owner and/or person for which it is issued," and "is not transferable or assignable." 50 C.F.R. 648.4(k). Thus, upon transfer, the new owner must apply for a new permit based upon the vessel's fishing history and permit eligibility.

Once a permit is issued, NMFS retains the power to suspend, revoke, or modify a permitee's fishing privileges. See 16 U.S.C. 1858(g) (1994 & Supp. V 1999); 50 C.F.R. 600.740(c); 50 C.F.R. 648.4(m); 15 C.F.R. 904.301. Federal fishing privileges are subject on a continuing basis to federal regulatory requirements. 50 C.F.R. 648.4(b).

2. A maritime lien is a privileged claim on a vessel or other maritime property that typically arises due to a vessel owner's failure to fulfill contractual obligations, or injuries caused by a vessel. Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 9-1, at 496 (2001 ed.) [hereinafter Schoenbaum]. The lien may attach not only to the vessel itself, but also to the vessel's appurtenances and equipment, as well as to its cargo, freights, and subfreights. *Id.* at 501; see *Piedmont & Georges Creek Coal Co.* v. *Seaboard Fisheries Co.*, 254 U.S. 1, 9 (1920). The lien stays with the maritime property to which it has attached, and is not extinguished by transfer of ownership in the property, "even to a good faith purchaser." Schoenbaum § 9-1, at 497.

Maritime liens may arise under general admiralty law or statute. The Commercial Instruments and Maritime Liens Act (the successor statute to the Federal Maritime Lien Act) provides that "a person providing

necessaries to a vessel on the order of the owner or a person authorized by the owner—(1) has a maritime lien on the vessel; (2) may bring a civil action in rem to enforce the lien; and (3) is not required to allege or prove in the action that credit was given to the vessel." 46 U.S.C. 31342(a).

Rule C(1)(a) the Supplemental Rules for Certain Admiralty and Maritime Claims (Supplemental Rules) provides that an action in rem may be brought in federal court "[t]o enforce any maritime lien." Once the court makes an initial determination that an in rem action is proper, "the court must issue an order directing the clerk to issue a warrant for the arrest of the vessel or other property that is the subject of the action." Rule C(3)(a)(ii)(A). "If the property that is the subject of the action consists in whole or in part of freight, the proceeds of property sold, or other intangible property, the clerk must issue * * * a summons directing any person controlling the property to show cause why it should not be deposited in court to abide the judgment." Rule C(3)(c).

3. On August 11, 1998, petitioner Miss Jenna, LLC purchased the fishing vessel *F/V Weymouth*. At the time of the sale, the *F/V Weymouth* had posted on board an NMFS fishing permit for scallops and summer flounder. The permit was referenced in the purchase and sale agreement, and petitioners had a "clear understanding and intent that the fishing history and fishing rights conferred by [the permit] were included with the sale of the *FV Weymouth*." Pet. App. 29; see *id.* at 29-30.[1] After the sale, petitioners changed the name of the vessel to the *F/V Miss Jenna*.

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[1] The permit was not valid at the time of the sale, because the previous owners had been sanctioned by NMFS. But upon trans-

On November 17, 1998, respondent Francis Patenaude filed an in rem action against the *F/V Miss Jenna* in the United States District Court for the District of Massachusetts, seeking to enforce a maritime lien for supplies that he had allegedly provided to the vessel before its sale to Miss Jenna, LLC. Pet. App. 29. Pursuant to an order of the district court, United States Marshals seized the *F/V Miss Jenna* in New Bedford, Massachusetts, where she has remained under arrest. *Id.* at 29-30. The fishing permit was posted on board the vessel at the time of the arrest. *Id.* at 30.

On December 8, 1998, petitioner Timothy Daniels applied to NMFS pursuant to 50 C.F.R. 648.4 (1998), to transfer the fishing history and limited access permit eligibility from the *F/V Miss Jenna* to a "replacement" vessel, the *F/V Top Flight.* Daniels was the authorized agent of Miss Jenna, LLC and owned or controlled the *F/V Top Flight.* Pet. App. 30-31. NMFS authorized the requested transfer and issued new fishing permits to the *F/V Top Flight* on January 5, 1999. *Id.* at 31. At the time, the *F/V Miss Jenna* remained under arrest and seizure. *Ibid.*[2]

On January 29, 1999, the district court ruled that Patenaude had valid in rem claims against the *F/V Miss Jenna.* On March 1, 1999, Patenaude purchased the *F/V Miss Jenna* on an "as is, where is" basis at a judicial auction. Pet. App. 31-32. The parties stipulated that Patenaude "assumed that the fishing history and

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fer of the vessel's title to Miss Jenna LLC, NMFS lifted the sanctions and issued a new fishing permit. Pet. App. 33.

[2] NMFS subsequently determined that the *F/V Top Flight* exceeded the maximum permissible length to qualify for a transfer of the fishing history of the *F/V Miss Jenna*, rendering the transfer invalid. Pet. App. 34.

permit eligibility were part of the vessel," but that he had not confirmed that understanding with NMFS and that the court's interlocutory sale order did not refer to the vessel's fishing history or permit eligibility. *Ibid.* After title had passed to Patenaude, he learned from NMFS that the fishing history and permit eligibility previously associated with the vessel had been transferred to the *F/V Top Flight*. *Ibid.*

4. On June 2, 1999, Patenaude filed an amended complaint against Miss Jenna, LLC, and Daniels, as well as NMFS and other federal entities. He sought to invalidate the December 1998 transfer of the fishing history from the *F/V Miss Jenna* to the *F/V Top Flight*, arguing that the fishing history and permit eligibility constituted an appurtenance of the vessel subject to his maritime lien. The federal defendants did not take a position as to whether the court should grant the requested relief, but noted that no precedent established that federal fishing privileges generally are appurtenances of the fishing vessel. Gov't Reply to Mot. for Prelim. Injunction 5.

On July 6, 1999, the district court entered a preliminary injunction in favor of Patenaude and ordered NMFS to invalidate the December 1998 transfer of fishing privileges and restore the fishing history of the vessel pending resolution of the case. Pet. App. 37-40. The district court entered final judgment in favor of Patenaude on October 31, 2000, finding that Patenaude had established a claim of $31,070 in rem against the *F/V Miss Jenna* and her appurtenances. In particular, the court concluded that "the appurtenances * * * transferred in the sale * * * included [the vessel's] fishing history and associated fishing permit, subject to generally applicable regulatory provisions." *Id.* at 4.

Petitioners appealed. While that appeal was pending, the First Circuit decided *Gowen, Inc.* v. *F/V Quality One*, 244 F.3d 64, 67-68 (2001), cert. denied, No. 01-19 (Oct. 1, 2001). In *Gowen*—in which NMFS was not a party—the court held that NMFS fishing permits and fishing histories are appurtenances of the vessel for purposes of an in rem action to enforce a maritime lien, and therefore had properly been included in a judicial sale to satisfy the lien. *Id.* at 68-69. In reaching that conclusion, the court reasoned that federal fishing privileges are "essential to the vessel's navigation, operation, or mission," and should be regarded as an "appurtenance" of the vessel under traditional maritime principles. *Id.* at 67 (internal citation and quotation mark omitted).[3]

Patenaude moved for summary affirmance in this case on the ground that *Gowen* "is controlling," a point that petitioners "concede[d]." Pet. App. 2. The court of appeals granted that motion and summarily affirmed the district court's decision on the basis of its recent *Gowen* decision. *Id.* at 1-2.

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[3] The *Gowen* court rejected an argument based on a 1996 statute providing for the creation of a registry for federal fishing permits, and requiring that security interests in such permits must be recorded to be valid against parties other than the transferor and persons with actual notice. See Sustainable Fisheries Act, Pub. L. No. 104-297, § 110(d), 110 Stat. 3590-3592 (16 U.S.C. 1855(h)). The court noted that the registration requirement does not take effect until NMFS promulgates final regulations creating a registry, which the agency has not yet done, and that the statute provided that security interests existing before the registry was created could be recorded in the registry. 244 F.3d at 69-70.

ARGUMENT

Petitioner urges (Pet. 8) this Court to grant certiorari to decide the "novel and difficult" question whether federal fishing privileges issued to a vessel are appurtenances of the vessel and thus subject to a maritime lien. This Court recently denied certiorari in a case presenting the same question. *F/V Quality One* v. *Gowen, Inc.*, No. 01-19 (Oct. 1, 2001). In the court of appeals, petitioners conceded that *Gowen* is "controlling precedent." Pet. App. 2; see Pet. 8. Because the decision in this case, like the decision in *Gowen*, does not conflict with any decision of this Court or of any other court of appeal, certioari should be denied in this case as well.

1. Petitioners argue (Pet. 9-10) that the court of appeals' decision "is inconsistent with the legislative intent of the Magnuson-Stevens Act" and NMFS regulations implementing that Act insofar as it treats federal fishing privileges as "property" that may be subject to a maritime lien. That is incorrect.

Neither the decision below nor *Gowen* purports to change the nature of federal fishing privileges or create new property rights. Rather, as the court of appeals stated in *Gowen*, the court simply concluded that "no obvious arguments exist against treating [fishing] permits *as subject to* lien." 244 F.3d at 69 (emphasis added). Moreover, nothing in the decision below or in *Gowen* purports to limit the regulatory authority of NMFS, or to grant permit holders (or their creditors) any new or different fishing privileges than those created by the statute or regulations. Fishing privileges that serve as security interests are subject to the same regulatory requirements as privileges that do not; the privileges do not convey a property interest in fish or a fishery or a right to be free of future regulatory

changes. And the district court in this case was careful to note that the sale of the vessel to respondent included the vessel's fishing history and associated fishing permit "subject to generally applicable regulatory provisions." Pet. App. 4.

2. Petitioners claim (Pet. 10) that the decision below "opens a Pandora's box with regard to the application of the Supplemental Admiralty Rules" for attaching or arresting intangible property. In particular, petitioners claim (Pet. 11) that the decision below will allow litigants "to effectively 'tie up' a fishing vessel by attaching or arresting only its intangible fishing privileges pursuant to [Supplemental] Rule E(4)(c)," thereby avoiding jurisdiction and venue requirements for arresting a vessel. That concern is overstated, and in any event provides no basis for granting review in this case—where the vessel was seized and the only question is whether the maritime lien applies to the federal fishing privileges as well as to the vessel itself. *Gowen* also involved a situation in which the maritime lien was asserted against the vessel as well as its appurtenances, including a federal fishing permit. There is no occasion, therefore, to consider whether federal fishing privileges could be attached in the absence of a vessel and, if so, how the Supplemental Rules might operate in that situation.

3. Although we do not believe certiorari is warranted in this case, we do not embrace the reasoning of the court of appeals in *Gowen* to the extent that *Gowen* may be read to establish a broad rule that federal fishing privileges are appurtenances of a vessel and thus subject to any maritime lien on the vessel.

In *Gowen*, the court of appeals applied a test drawn from case law defining an appurtenance as an item "that is essential to the [ship's] navigation, operation, or

mission." *Gowen*, 244 F.3d at 67 (quoting *Gonzalez* v. *M/V Destiny Panama*, 102 F. Supp.2d 1352, 1356 (S.D. Fla. 2000)). Under that approach, appurtenances subject to a maritime lien typically have constituted physical equipment or items on a vessel. See Schoenbaum § 9-1, at 502 (examples of "appurtenance to which a lien on a vessel attaches include a winch and gallowes installed on a fishing boat, fishing stores onboard a whaling ship, cement loading, bagging, and unloading equipment, a refrigerator on a ship carrying meat as cargo, a diving bell and air pump used for pearl fishing, and tanks used to carry oil") (footnotes and citations omitted).

Treating federal fishing privileges as an appurtenance—particularly in an unqualified or categorical fashion—would expand the traditional concept of an appurtenance subject to a maritime lien. This Court and others have held that, because maritime liens are secret and "may operate to the prejudice of prior mortgagees or of purchasers without notice," such liens "will not be extended by construction, analogy, or inference." *Piedmont & Georges Creek Coal Co.* v. *Seaboard Fisheries Co.*, 254 U.S. 1, 12 (1920); see *Osaka Shosen Kaisha* v. *Pacific Export Lumber Co.*, 260 U.S. 490, 499-500 (1923); *Racal Survey U.S.A., Inc.* v. *M/V Count Fleet*, 231 F.3d 183, 192 (5th Cir. 2000). That principle counsels against adoption of any categorical rule treating fishing privileges as appurtenances subject to lien.

Federal fishing privileges are not "essential" to a vessel's navigation or necessarily to its operation, at least as a general matter. Nor are federal fishing privileges always "essential" even to the operation of a fishing vessel in accomplishing its specific mission. Even without such privileges, a vessel may still be free to fish in waters outside the regulatory jurisdiction.

Fishing privileges may increase the economic value of the vessel, but they do not enhance its physical utility to perform its intended purpose. Nor is the regulatory link between fishing privileges and vessels directly analogous to the link between a vessel and its physical equipment, such as its engines or radar equipment. Even in regions such as the Northeast where permit eligibility generally follows the vessel, it does not always do so. A vessel may be transferred without its fishing history; a fishing history can survive a vessel that has sunk; and the new owner of a vessel with a fishing history must still apply for a new permit. 50 C.F.R. 648.4(a)(1)(i).

In addition, many types of federal fishing privileges are not restricted to a particular vessel. For example, in the Pacific groundfish fisheries, permits are issued directly to vessel owners, rather than to vessels. 50 C.F.R. 660.333. A permit enables a fisherman to catch a specific amount of fish in a single fishing trip. Although in most cases fishermen use their own vessels, permits are not vessel-specific and can be leased to other fishermen. Individual fishing quotas allocate distinct portions of the total available catch of harvestable fish to particular fishermen but are often freely transferable. 50 C.F.R. 679.42 (Alaska halibut and sablefish fisheries). Although fishermen still require a permit to participate in the halibut or sablefish fishery, fishermen may fish from any vessel that meets the specifications written into their permits. A privilege that can be exercised in connection with different vessels is difficult to characterize as "appurtenant" to a particular vessel. It is not apparent, moreover, that fishing privileges should be deemed to be "appurtenant," or not, based on the mechanics of a particular region's permit scheme.

United States v. *Freights, etc., of S.S. Mount Shasta*, 274 U.S. 466 (1927), relied upon by the court of appeals in *Gowen*, 244 F.3d at 68, does not compel the conclusion that fishing privileges are appurtenances subject to a maritime lien. *Mount Shasta* held that a district court sitting in admiralty had jurisdiction to enforce a lien against subfreights that were created by a contract between the owner of the vessel (the United States) and a bareboat charter party and that were "admitted to be due and payable." 274 U.S. at 469-470. The Court characterized the subfreights as "a debt," or "right of the creditor's," that is "capable of being attached." *Id.* at 470. The Court did not hold that the subfreights were appurtenances of the vessel, and subject to a lien on that basis.

The *Gowen* court observed that treating fishing privileges as appurtenances of a vessel would assist fishermen in providing the "secured credit that is often necessary to ensure that a vessel can obtain the basic supplies and services needed for its operation." 244 F. 3d at 68; see Pet. App. 23. The paucity of case law on the question presented, however, suggests that there is no widespread practice of attempting to assert maritime liens covering fishing privileges. And fishermen who wish to pledge their fishing privileges as security may do so by contract or by recording a security interest in the privileges under state commercial law. Indeed, recent legislation directing NMFS to establish a registry for fishing permits—which is not yet in place—specifically provides for the recording of security interests in federal fishing permits. 16 U.S.C.

1855(h)(4) (Supp. V 1999); see *Gowen*, 244 F.3d at 69-70.[4]

4. Despite our disagreement with the breadth of the reasoning of the court of appeals in *Gowen*, we do not believe that this Court's review is warranted in this case, especially since the Court has denied review in *Gowen* itself. *Gowen* is the first reported decision in any court of appeals directly to address whether federal fishing privileges are appurtenant to a vessel and thus subject to a maritime lien. See Pet. 8 (question presented is one of "first impression"). There is no conflict of authority warranting this Court's review and, thus, no disruption in the uniformity of federal maritime law. Further consideration of the question presented by the lower courts may help to identify the different commercial contexts in which maritime liens are asserted against federal fishing privileges, as well as the extent to which the various kinds of fishing privileges authorized under federal law appropriately may be characterized as "appurtenances" of a vessel. In addition, the establishment of the national registry system for fishing permits called for by the Sustainable Fisheries Act, Pub. L. No. 104-297, 110 Stat. 3559, and regulations thereunder, may also bear on the ultimate resolution of the question presented.

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[4] NMFS issued an advanced notice of proposed rulemaking in 1997, see 62 Fed. Reg. 10,249, and has held public meetings on its proposed rule since then, 64 Fed. Reg. 12,925 (1999). But the agency has not yet issued a final rule implementing the national registry system.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JOHN C. CRUDEN
Acting Assistant Attorney General

ANDREW MERGEN
SEAN H. DONAHUE
Attorneys

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